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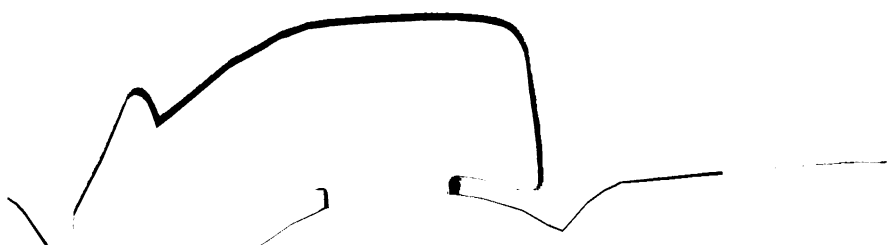
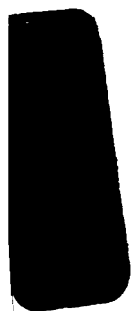
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THE  
JURISDICTION AND PROCEDURE  
OF THE  
ADMIRALTY COURTS  
OF THE  
UNITED STATES  
IN  
CIVIL CAUSES.  
(ON THE INSTANCE SIDE.)

BY  
MORTON P. HENRY.

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I CAN therefore see no ground for jealousy or enmity to the admiralty jurisdiction. It has in it no one quality inconsistent with or unfavorable to free institutions. The simplicity and celerity of its proceedings make a jurisdiction of that kind a necessity in every just and enlightened commercial nation.

TANEY, C. J., in *Taylor v. Carryl*, 20 How. 616.



## P R E F A C E.

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AN author has lately written that few people are aware how much the construction and growth of American institutions have been the result of the judicial interpretation of the constitution by the Supreme Court of the United States. The idea of national unity has been developed by the construction of the clause intended to make the commerce of the nation a unit, and the administration of the maritime law under the admiralty grant of the constitution has perhaps had as much effect as that under the commercial clause.

It was generally understood at the time of the grant that the scope of the jurisdiction conferred by the constitution on the courts of the United States was the same as that allowed to be exercised by the court of admiralty in England. Had this view prevailed, the part which the admiralty would have taken in the development of the government would have been comparatively unimportant. Judge Story saw the necessity of taking a more extended view of the nature of the grant in causes of admiralty and maritime jurisdiction than that accorded to the courts of admiralty in England, and within his sphere as a circuit court judge he sought the scope for the exercise of this jurisdic-

tion in the maritime codes and laws of other nations than England.

In accordance with his views, although not in his lifetime, the admiralty system of the United States has been extended by the judicial construction of the Supreme Court so as to embrace the water-borne commerce of the United States conducted on its internal navigable waters as well as on the high seas, and has grown to include all maritime services and contracts, and all injuries when inflicted upon such waters, and that court has endeavored to make, so far as the limitation of appeals of the federal judicial system would permit, the law covering such subjects uniform throughout the several states. Yet the limitation of the right of appeal to the highest court has left each judicial circuit in the United States, in a great measure, independent of the others, and has brought upon the administration of the admiralty law the criticism that a different law prevails in different circuits of the United States (see remarks in *The City of Tawas*, 3 Federal Reporter, 170; *The De Smet*, 10 Federal Reporter, 483) in a system where the rulings of the courts ought to be uniform, and in which good sense ought to be good sense at Athens as well as at Rome. It has also developed a fault of the opposite nature by which judgments in one circuit have been followed in others merely for the sake of uniformity; at times engrafting on the law of these courts rules difficult of application, the revisal of which is not easy under the present appellate system. The correction of these two opposite defects must be slow, and in many cases almost impossible until some system is devised by which the results of an appeal shall become binding in all judicial circuits without the delay

incident to an appeal to the Supreme Court. It will not be out of place to suggest that any system which creates a number of independent intermediate appellate courts will not have a tendency to diminish this evil.

In connection with this subject it is proper also to advert to the doctrine enunciated in the case of *The Genesee Chief* (12 Howard, 443), and repeated in *The St. Lawrence* (1 Black, 522), that the limit of the grant of admiralty jurisdiction to the courts of the United States is independent of and beyond the control of congressional legislation—a doctrine which has probably prevented the correction of some judicial errors by legislation, and has interfered with needed reforms and the extension of the admiralty jurisdiction to subjects peculiarly within its province. The assertion of the independence of the admiralty from legislative control in such a government as that of the United States of America would seem almost to refute itself. Such a construction of a grant of judicial power would not carry with it the assent of the profession if asserted as to any other branch of the federal jurisdiction; and it is difficult to believe that any skill in dialectics could support such an interpretation of the admiralty grant as would prevent any change in the jurisdiction of the courts established by congress to administer this branch of the law without a change in the organic form of the government itself.

And the rod which the admiralty courts hold over their subjects by their peculiar power of administering remedies by the process *in rem*, would become insupportable in the hands of an incapable or indifferent judiciary, since the right to the remedy of the writ of prohibition from the Supreme Court directly to the District Courts (*Ex parte*



Hagar, 104 U. S. 520; *Ex parte* Pennsylvania, 199 U. S. 174) has been so much restricted, and redress confined to an appeal, which, in a majority of cases, the amount involved denies to the suitor.

It is believed that the views of Chief Justice Taney in *The Genesee Chief* find no support in the previous decisions of the same court (*vide* *Waring v. Clark*, 5 Howard, 441). Later opinions would seem to recede from so extensive a claim of judicial independence (*The Lottawana*, 21 Wallace, 558; *Hine v. Trevor*, 4 Wallace, 555); and although legislation under the commercial clause has affected the administration of the law of the courts of admiralty, notably in proceedings to limit the liability of ship-owners, yet the great respect which is attached to that Chief Justice's acquirements and character, has left its trace upon the decisions of the admiralty, and in one instance at least, an attempt towards improvement by legislation is believed to have been abandoned by reason of the doubts arising as to the power of congress to interfere in this subject. While a doubt exists, and until it is finally disposed of, the extension of the remedial processes of the admiralty to subjects with which it is peculiarly capable of dealing, will be met by the question of the power of congress to do so.

The admiralty jurisdiction has been widely extended, and happily so, by judicial construction in the Supreme Court of the United States. There is, therefore, certainly some inconsistency in the judicial power undertaking to deal with causes of action arising from death, although such a cause of action was unknown to those who adopted the constitution, and yet refusing to extend it in matters of

account relating to the employment of ships, the sale of vessel property in case of disputes between joint owners, and the enforcement of the right of mortgagees by a judicial sale under proceedings *quasi in rem*, which would give such a title to purchasers as would be recognized in all parts of the world; a jurisdiction which it has been found convenient to confer upon the English admiralty, and which such courts are peculiarly capable of administering.

The subject of this treatise is the jurisdiction of the American courts of admiralty and their procedures in such causes. The word "procedure" is somewhat indefinite in its meaning; it is here used in the sense of denoting the remedies as distinguished from the forms and modes of applying them. The latter is the subject of a work on practice. Within its scope the author has endeavored to make this volume a book of reference for practitioners.

As a rule, the law enforced by the admiralty courts produces the same results as when administered in other courts, yet, in one of the most frequent causes within its jurisdiction, collision, the law as administered by the admiralty produces radically different results from a proceeding for the same cause in other courts, by reason of the different effect given to the law of contributory negligence, and of agency creating liability of owners for injuries caused by their servants. The effect of liens given by the maritime law, and by statutes enforceable in the admiralty, is also violently the reverse in its rules of priority from that enforced in other courts. The proceedings to limit the liability of ship-owners are now also exclusively the subject of the admiralty jurisdiction.

These branches of the maritime law have, therefore, been treated under separate chapters. Incidentally, however, the author has sought to treat of the maritime law whenever it came within the scope of his work, although that branch of the law is not peculiar to the admiralty.

The jealousy of this jurisdiction has wholly disappeared, yet it is only of late that the maritime law has been fully administered on the admiralty side of the American and English courts. Until the extension of the jurisdiction by judicial construction in this country, and by legislative enactment in England, it was left to the ordinary courts of both countries to develop their systems of maritime law, and its relation to the private international law of the world, affecting commerce conducted on the high seas. This law mostly derived from that of the continent of Europe and the civil law, found its earliest and most intelligent expounders in judges of other courts than those of admiralty. The author has, therefore, found it necessary, occasionally, to refer to the authorities and decisions of the ordinary tribunals, both English and American, which have treated this important system with a judicial comity resulting from enlightened minds thinking alike, producing a system of maritime jurisprudence almost harmonious.

The author has not thought it necessary to trace the history of the conflict of the English admiralty with the common law courts, to maintain its jurisdiction, which has now lost its interest, since the value and necessity of the jurisdiction are recognized. Indeed the tendency is rather toward development than restriction of the system. In the first chapter he has endeavored to trace the gradual

development of the American admiralty to the extent of its present conceded jurisdiction.

The attempt is made to combine the results of the decisions in a text-book, in which form they will be more readily accessible to the lawyer than in a digest of cases. However desirable, it has been found impossible to avoid criticism where decisions are conflicting, without expressing contradictions in the text. It may be fairly said that the divergence is less than might have been expected under our present judicial system.

The author trusts that the work will be found of use to the profession.

He desires to express his thanks to ALBERT B. RONEY, Esq., for his care in supervising the work as it has gone through the press, and for the verification of the authorities.

MORTON P. HENRY.

PHILADELPHIA, 1885.

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## ERRATA AND ADDENDA.

- Page 8, line 3, *for* "had," *read* "subsequently."
- " 35, line 22 of column 1, *which reads* "No jurisdiction in account, § 23," *change* "§ 23" to "§ 25."
- " 60, line 1 of note 1, *for* "Duston," *read* "Ouston."
- " 92, line 1, *for* "dredge sand," *read* "dredges and."
- " 138, line 13, *for* "title," *read* "entitle."
- " 153, line 6, *for* "1845," *read* "1842."
- " 156, line 7, *for* "right," *read* "remedy."
- " 156, line 8, *for* "remedy," *read* "right."
- " 227, line 3, *after* "vessel," *add* "or any person."
- " 276, note 2. While this work was in press, Congress, by Act of March 3, 1885, adopted the revised International Rules of 1863, both as to public and private vessels.
- " 302, line 3 of note, *after* "U. S.," *insert* "377."

shipowners by proceedings in admiralty to obtain the benefit of the act of 1851, is enforced under the rules authorized by statutes and not by powers inherent in the courts of admiralty.<sup>1</sup>

The fact that the statutes which gave rise to the exercise of such jurisdiction adopted provisions known to the ancient maritime law, does not make the exercise of such power any the less the result of legislation; as the subjects of the admiralty and maritime jurisdiction of the courts of the United States are not derived from treatises on the maritime law, nor the codes or ordinances of particular maritime states, but consist of such only as had been accepted and received as part of the maritime law of the United States when the constitution went into effect.<sup>2</sup> And in the absence

<sup>1</sup> Rev. Stat. §§ 4282-9; *The Norwich Co. v. Wright*, 13 Wall. 104.

<sup>2</sup> Bradley, J., in *The Lottawana*, 21 Wall. 558; *The Scotia*, 14 Wall. 170. Brett, L. J., takes the same view of the maritime law as administered by the English admiralty, *The Gaetano and Maria*, L. R. 7 P. D. at p. 143: "Every court of admiralty is a court of the country in which it sits and to which it belongs. The law which is administered in the admiralty court of England is the English maritime law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty either by act of Parliament or by repeated decisions and traditions and principles has adopted as the English maritime law."

"Nothing can be more uncertain," says another English judge, "than the term 'universal maritime laws,' to which the court is to

of any such general maritime law, when new subjects fairly embraced within the meaning of the words of the grant of maritime jurisdiction shall arise, the extension of the admiralty process to meet such cases will of necessity follow, so as to include them within its remedial processes.

§ 18. The declaration that congress cannot create or enlarge the admiralty jurisdiction of the courts under the constitution, although stated by such high authority as that of Chief Justice Taney, must be received within certain limits.

In *Waring v. Clarke*<sup>1</sup> it was considered an unanswerable constitutional objection to the limitation of all cases of admiralty and maritime jurisdiction, to such as were included in that jurisdiction in England when the constitution was adopted, that it would be a denial to congress of all legislation upon the subject.

It is not probable that the public men who framed the constitution intended to leave the future adaptation of admiralty jurisdiction to the neces-

look for the sources of its jurisdiction. To discover it we must look to the forum which administers the law. 'Any general, much more any universal law, binding on all nations using the highway of the sea in time of peace, except when limited, as administered in some court, is easier longed for than found.' Per Willes in *Lloyd v. Guibert*, L. R. 1 Q. B. 115.

<sup>1</sup> 5 How. at p. 457.

sities of commerce to judicial legislation; which would create an arbitrary tribunal beyond the reach of the law. It may be conceded as expounded that it cannot be applied to any other subjects than those which are of admiralty and maritime nature so as to exclude causes occurring on land. The courts may declare the law entrusted to them, but cannot extend or withdraw from the jurisdiction conferred, and in the latest discussions of the subject, the Supreme Court adopts this view.

“We must always remember that the court cannot make the law, it can only declare it. If within its proper scope any change is desired in its rules other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the constitution contemplated that the law should forever remain unalterable.

“Congress has undoubtedly authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former.”<sup>1</sup>

<sup>1</sup> Per Bradley, J., in *The Lottawana*, 21 Wall. at 577.

## CHAPTER II.

## SUBJECTS OF ADMIRALTY JURISDICTION.

General Principles: Torts, contracts, services, and seizures, § 19.	Extends to all navigable waters, § 27.
Contracts and services, what are maritime, § 20.	Includes canals, § 27.
Shipbuilding contracts not maritime, § 21.	What are public navigable waters, § 27.
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Possessory and petitory suits, § 23.	Jurisdiction not inherent in the admiralty, § 29.
Between part owners and against third parties, § 23.	Seizures on land not triable in the admiralty, § 29.
Right of majority to employ, § 23.	Place of seizure determines the jurisdiction, § 29.
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Right of majority to appoint and dismiss master, § 23.	The right to arrest suspended as to private vessels while in public service, § 30.
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In torts, dependent on locality, § 26.	Right to arrest public vessels when engaged in trade, <i>quare</i> , § 30.
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Extends to property brought in as prize by public armed vessels, § 31.	Conflict of laws in suits by and against foreign vessels, § 35.
Character of vessels the subject of jurisdiction, § 32.	General principles, § 36.
Jurisdiction in suits against foreign vessels, § 33.	No universal maritime law, § 37.
Jurisdiction discretionary, § 33.	The maritime law is that adopted by the municipal law of the forum, § 37.
Causes of collision and salvage are <i>communis juris</i> , § 33.	A vessel regarded as part of the territory of the sovereign, § 37.
Admiralty courts never refuse jurisdiction in collision, § 33.	Contracts of the master governed by the law of the flag, § 38.
In suits by seamen, courts reluctant to take jurisdiction, § 34.	Unless invalid by the law of the place where made, § 38.
Unless where the voyage is at an end, § 34.	Foreign vessels subject to liens according to law of port, § 39.
	Foreign law, how proved, § 40.

§ 19. THE admiralty and maritime jurisdiction conferred by the constitution on the courts of the United States embraces two great classes of cases: one dependent upon locality, and the other upon the nature of the contract or service.<sup>1</sup> The first embraces all claims for torts committed on the high seas and upon the navigable waters of the United States, without reference to the locality as affected by the ebb and flow of the tide,<sup>2</sup> or as being within the body of the county; and without regard to the nature of the employment of the vessel, whether engaged in the foreign or in the interstate trade, or in the internal commerce of the

<sup>1</sup> *Ex parte Easton*, 95 U. S. 68; Story Const. § 1660.

<sup>2</sup> *The Genesee Chief*, 12 Howard, 443; *Waring v. Clarke*, 5 How. 441.

state.<sup>1</sup> It includes all injuries, whether committed by direct force or in consequence of negligence or malfeasance, including personal injuries to passengers, seamen, or freighters, or suffered by a stranger unconnected with the vessel.<sup>2</sup> The second embraces all contracts, claims, and services which are purely maritime, and which respect rights and duties appertaining to commerce and navigation.<sup>3</sup>

This has been held not to cover services or contracts in domestic vessels engaged in the internal commerce of a state;<sup>4</sup> but the distinction between the domestic and external trade of a state appears no longer to exist when conducted on the public navigable waters of the United States.<sup>5</sup>

In addition to the subjects included under these

<sup>1</sup> *The Commerce*, 1 Black, 574; *The Brooklyn*, 2 Ben. 547.

<sup>2</sup> *Leathers v. Blessing*, 105 U. S. 626; *The Juniata*, 93 U. S. 337; *The P. W. & B. R. R. Co. v. The P. & H. de G. St. Tow-boat Co.*, 23 How. 209; *The Lord Derby*, 17 Fed. Rep. 265. See *The Germania*, 9 Ben. 356, where it was held that there is no duty by the owners to one who bears no relation to the ship, even if not a trespasser, which will support an action.

<sup>3</sup> 2 Story Const. § 1666.

<sup>4</sup> *Allen v. Newberry*, 21 How. 244; *Maguire v. Card*, 21 How. 248; see, also, *The Mary Washington*, 14 Am. Law Reg. 692.

<sup>5</sup> *The Belfast*, 7 Wall. 624; *U. S. v. B. & H. Co. Ferry Co.*, 21 Fed. Rep. 331. In this last case it is suggested with force that any principle which would exclude the exercise of the admiralty jurisdiction over vessels in the internal commerce of a state

two general heads, the admiralty exercises jurisdiction in possessory actions between part owners in regard to the use and employment of the vessel;<sup>1</sup> and also of petitory suits involving the title to vessels.<sup>2</sup> This process must be *in rem* against the vessel, and *in personam* against the adverse party.<sup>3</sup> The same jurisdiction is now entertained in petitory suits in the English admiralty by the statute of 3 and 4 Vict. c. 65, § 4. The jurisdiction in possessory and petitory suits is concurrent with that of the state courts,<sup>4</sup> and extends to the recovery of possession from third parties who have dispossessed the rightful owners.<sup>5</sup> It in-

would extend to such commerce on the ocean, as well as on the rivers and lakes. See *Lord v. The Steamship Co.*, 102 U. S. 541.

<sup>1</sup> *The Orleans v. Phoebus*, 11 Peters, 175; *Ward v. Peck*, 18 How. 267; *The C. C. Trowbridge*, 14 Fed. Rep. 874; *Willings v. Blight*, 2 Peters Adm. Rep. 288; *Tunno v. The Betsina*, 5 Am. Law Reg. 406; *The Seneca*, Gilp. 10; *The Ocean Belle*, 6 Ben. 253.

<sup>2</sup> *Ward v. Peck*, 18 How. 267; *The New Eng. Ins. Co. v. The Sarah Ann*, 13 Peters, 387; *Taylor v. The Royal Saxon*, 1 Wall. Jr. 311; *The Tilton*, 5 Mason, 465; Adm. Rule, 20; *Knyock v. The S. C. Ives*, 1 Newb. 205; *The Watchman*, 1 Ware, 232.

<sup>3</sup> *Knyock v. The S. C. Ives*, 1 Newb. 205.

<sup>4</sup> *Taylor v. The Royal Saxon*, 1 Wall. Jr. 311; *Daily v. Doe*, 3 Fed. Rep. 903.

<sup>5</sup> *The Friendship*, 2 Curtis, 426; *The Fannie*, 8 Ben. 429; 528 *Pieces of Mahogany*, 2 Low. 323; *The J. W. French*, 13 Fed. Rep. 916.

cludes jurisdiction of all seizures made upon the water under the laws of impost, navigation and trade of the United States, and it exercises a supervisory jurisdiction in cases of wreck, on the application of the master, and for the survey of damaged vessels and their cargoes,<sup>1</sup> and the enforcement of the decrees of the federal and other foreign admiralty courts.<sup>2</sup>

The jurisdiction of the admiralty in proceedings *in rem* in actions in tort, as well as in contract, is exclusive of the state courts, while the common law courts have concurrent jurisdiction with the admiralty in all proceedings *in personam*.<sup>3</sup>

§ 20. The jurisdiction of the admiralty extends to all contracts of affreightment, whether by charter party or by bill of lading, when performed upon the high seas or the navigable waters of the United States.<sup>4</sup> While it has no jurisdiction to enforce preliminary agreements to enter into a charter party,<sup>5</sup> it has if the charter party

<sup>1</sup> The Tilton, 5 Mason, 465.

<sup>2</sup> Penn. R. R. Co. v. Gilhooley, 9 Fed. Rep. 618; The City of Mecca, L. R. 6 P. D. 106; The Centurion, 1 Ware, 477; Otis v. The Rio Grande, 1 Woods, 279.

<sup>3</sup> The Lottawana, 21 Wall. 558.

<sup>4</sup> The New Jersey Steam Nav. Co. v. The Merchants' Bank, 6 How. 344; Morewood v. Enequist, 23 How. 491.

<sup>5</sup> Andrews v. The Essex F. & M. Ins. Co., 3 Mason, 6; The Tribune, 3 Sum. 134.

has been executed, but the parties refuse to carry it out.<sup>1</sup> It embraces contracts for the carriage of passengers, including all suits growing out of the relation of passenger and carrier;<sup>2</sup> marine insurance;<sup>3</sup> salvage,<sup>4</sup> including agreements of consort-

<sup>1</sup> *Oakes v. Richardson*, 2 Low. 173; *Maury v. Culliford*, 10 Fed. Rep. 388; *The Fifeshire*, 11 Fed. Rep. 743.

<sup>2</sup> *The New World*, 16 How. 469; *The Moses Taylor*, 4 Wall. 411; *The Aberfoyle*, 1 Blatch. 360; *The Pacific*, 1 Blatch. 569; in which a lien was held to be created by failure to comply with the terms of an agreement for passage which had been paid in advance.

<sup>3</sup> *Ins. Co. v. Dunham*, 11 Wall. 1; *The Sun M. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485.

<sup>4</sup> Salvage is a reasonable reward for services rendered in saving property in danger of perishing from a maritime misadventure, by parties under no obligation of duty, who voluntarily undertake the service. *Maude & Pollock on Shipping*, 419; *MacLachlan on Shipping*, 597; *The Neptune*, 1 Hagg. 227; *The Thetis*, 3 *ibid.* 14.

A suit for salvage is neither in contract nor tort. It resembles the latter in being a proceeding for unliquidated damages, and in being dependent on locality. *Fifty Thousand Feet of Lumber*, 2 Low. 64.

The crew are not entitled to participate in saving the vessel or cargo as salvors. *The Jonge Andries*, 1 Swabey, 226; *Miller v. Kelly*, Abb. Adm. 564; *The John Perkins*, 21 Law Rep. 87. Unless where their connection with the voyage has ceased. *The Antelope*, 1 Low. 130. And a pilot is not allowed to claim salvage for services as a pilot to a vessel in distress. *Hobart v. Drohan*, 10 Peters, 108; *The Wave*, 2 Paine, 131; *The Le Tigre*, 3 Wash. 567; *The C. D. Bryant*, 19 Fed. Rep. 603. Although under exceptional circumstances he may become a salvor. *The Grid*, 21

ship between wreckers, and to compel distribution

Fed. Rep. 423; *The Wave*, Blatch. & H. 235; *Hand v. The Elvira*, Gilpin, 60; *The Peragio*, Bee, 212; *The Sarah*, 1 C. Rob. 312, note.

Nor are passengers except in cases where their services are extraordinary; *The Branston*, 2 Hagg. 3, note; *The Vrede*, Lushington, 322; *The Two Friends*, 1 C. Rob. 271; as in case of peril all are obliged to contribute to the common safety. Nor can salvage be claimed for saving property from loss occasioned by the fault of the salvor. *The Clarita and Clara*, 23 Wall. 1; *The Iola*, 4 Blatch. 28.

The exceptions as to the crew are when their relations to the vessel are dissolved by abandonment or otherwise. In such case they may assume the position of salvors, and obtain the same reward. *Mason v. The Blaireau*, 2 Cranch, 240; *Hobart v. Droган*, 10 Peters, 108; *Taylor v. The Cato*, 1 Peters Adm. 48; *Clayton v. The Harmony*, 1 Peters, 70; *The Two Catharines*, 2 Mason, 319; *The Triumph*, 1 Sprague, 448; *The Warrior*, Lush. 476; *The Olive Branch*, 1 Low. 286; *Phillips v. McCall*, 4 Wash. 141.

Passengers may also become salvors under exceptional circumstances. *The Connemara*, 108 U. S. 352. Thus, an engineer, who was a passenger on board the *Great Eastern*, who contrived a steering apparatus by which the vessel was enabled to steer when in danger by reason of the loss of her rudder, was held to be entitled to salvage. *The Great Eastern*, 11 Law Times (N. S.) 516; 2 Mar. L. C. Adm. 148.

So, a master mariner, who assumed command of a steamship after the master and first and second officers were swept off the bridge by a wave in the height of a storm, was held entitled to salvage for services in bringing the vessel to port. *The Pennsylvania*, 31 Leg. Int. (Pa.) 237. And the enlisted men of a regiment on board of a transport in the government service who, by inces-

by one salvor who has received the whole amount

sant pumping, kept the vessel afloat, by which means the transport was brought into port in safety, were held entitled to claim to be salvors. *The Merrimac*, 1 Ben. 201.

But, in this case, while one of the reasons considered was the fact that the men could have landed and have saved themselves before the vessel was brought into port, their relation, independently of this, was held not a contractual one like that of ordinary passengers who owed a duty to the ship. See, also, *Newman v. Walters*, 3 B. & P. 612; *The Branston*, 2 Haggard, 3, note; *The Salacia*, 2 Haggard, 262; *The Vrede*, Lush. 322.

The elements which enter into the amount of the salvage award are—

- 1st. The value of the property saved.
- 2d. The risk to which the property saved was exposed.
- 3d. The risk of life and property incurred in effecting the service.

*The Egypt*, 17 Fed. Rep. 359; *The Mary E. Dana*, 17 Fed. Rep. 350. The shortness of time does not affect the merit of the service. *Sonderberg v. The Towboat Co.*, 3 Woods, 146.

In ordinary cases the Supreme Court will not alter the award of salvage, unless where the amount awarded is so excessive as to be palpably a mistake. *The Connemara*, 108 U. S. 352; *Hobart v. Drogan*, 10 Pet. 108; *The Dos Hermanos*, 10 Wheat. 306. The Circuit Courts on appeal do so. *The Paquet Bot de Cayenne*, 27 Leg. Int. (Pa.) 364; *The Saratoga v. Bales of Cotton*, 1 Woods, 75.

The saving of life is not a salvage service by the maritime law, but it is considered in estimating the reward when connected with the saving of property in awarding salvage. *The Emblem*, 2 Ware, 68; *The Aid*, 1 Haggard, 83; *The Two Catharines*, 2

among cosalvors;<sup>1</sup> general average;<sup>2</sup> bottomry and respondentia.<sup>3</sup>

Mason, 319; *The Charles Avery*, 1 Bond, 117; *The George Nicholaus*, 1 Newb. 449; *The Boston*, 1 Sumner, 328.

By the English law, assistance for the purpose of saving lives on board a ship in distress on the coast of Great Britain is a salvage service chargeable on ship and cargo. Lowndes on General Average, p. 86, note; *The Fusilier*, Br. & Lush. 341.

Persons who furnish boats or lines are not entitled to participate

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<sup>1</sup> *McConnochie v. Kerr*, 9 Fed. Rep. 50.

<sup>2</sup> *Dupont v. Vance*, 19 How. 162; *Coast Wrecking Co. v. Phoenix Ins. Co.*, 13 Fed. Rep. 127; *Fitzpatrick v. Eight Hundred Bales of Cotton*, 3 Ben. 42. It is said in *Cutler v. Rae*, 7 How. 729, that the admiralty has no jurisdiction *in personam* in general average, but the question of jurisdiction did not arise; the case was one where the cargo had been delivered to a consignee not the owner, and it was held that no liability arose from the acceptance of the goods on the part of the consignee to pay general average charges, the lien was lost by an unconditional delivery. If the proceeds remained in the hands of the consignee, or the goods had been made away with by the consignee improperly, a different question would have arisen, as the master can hold the goods until the general average is adjusted, and his lien, like that for freight, is lost by unconditional delivery. *The Morning Mail*, 17 Fed. Rep. 545.

It extends to the enforcement of contribution on a bond given for general average. *Gloucester Ins. Co. v. Younger*, 2 Curtis, 322; *Coast Wrecking Co. v. Phoenix Ins. Co.*, 7 Fed. Rep. 236.

<sup>3</sup> *The Grapeshot*, 9 Wall. 129; *The Virgin*, 8 Peters, 538; *The Julia Blake*, 107 U. S. 418; see Admiralty Rule, No. 18; *Snow v. Scrap Iron* (180 $\frac{3}{4}$  tons), 11 Fed. Rep. 517.



### Also claims for repairs, supplies, and materials

as salvors. Such services are compensated by way of equitable compensation when any real damage is done or loss is sustained. *Hawkins v. Avery*, 32 Barb. 551; *The Charlotte*, 3 W. Rob. 68; *The Ottawa*, 1 Low. 274. Deviation is justified for the purpose of saving life; *The Nathaniel Hooper*, 3 Sumner, 542; *Arnold on Ins.* 479; *The Cora*, 2 Wash. 80; but not for the purpose of saving property. 1 *Phillips on Ins.* § 1028; *Scaramanga v. Stamp*, L. R. 4 C. P. D. 316; 5 C. P. D. 295.

Cosalvors are entitled to participate in the salvage award according to the merits of their services. *The Blackwall*, 10 Wall. 1; *Norris v. The Island City*, 1 Cliff. 219; 1 Black, 121; *The Anna*, 6 Ben. 166; *Box of Bullion*, 1 Sprague, 57; *The Sarah*, L. R. 3 P. D. 39; *The Ottawa*, 1 Low. 274.

In the division of the award, both owners and crew of the salving vessel are entitled to participate. In salvage by the crew of sailing vessels, the proportion paid to the crew is larger than that to the owners, the latter being recompensed for deviation, and the danger to their own vessel by being deprived of the services of part of their crew. In all cases an extra allowance being made to the master of the salving vessel for the responsibility incurred in undertaking the service, and also to any member of the crew whose services were peculiarly meritorious. *The Henry Ewbank*, 1 Sumner, 400; *The Blaireau*, 2 Cranch, 240. But the award to each set of salvors who strip and discharge a wrecked vessel does not usually depend upon the value of the goods which each salvor actually saved. *The Albion Lincoln*, 1 Low. 71.

Although the salvage service is entire, it is not treated as such for the purpose of founding a right against all the interests saved, so as to make them all jointly responsible for the whole salvage. Each claimant is responsible only for the salvage properly due and chargeable on the value of his own property *pro rata*. Strat-

furnished to both foreign and domestic vessels, in-

ton v. Jarvis, 8 Peters, 4; The Col. Adams, 19 Fed. Rep. 795; *Ex parte* The Balt. & Ohio R. R. Co., 106 U. S. 5; The Connemara, 103 U. S. 754.

Cargo when exposed to greater risk of destruction than the vessel, was decreed to pay a larger sum on apportionment than the vessel in The Cyclone, 16 Fed. Rep. 486; see, also, The Lahaina, 19 Fed. Rep. 923.

In salvage by steam vessels the vessel's proportion is largely increased, as the use of its motive power and expenses by retardation of the voyage are the principal ingredients of the service. Yet the crew are entitled to participate, although in a diminished proportion. The Tornado reported in Cohen's Adm. Law, p. 150; The Martin Luther, Swabey, 287; The C. W. Ring, 2 Hughes, 99 The True Blue, L. R. 1 P. C. 250.

In steamers especially fitted for relieving disabled vessels, the crew's proportion is less than in other cases of towage. The Flower City, 16 Fed. Rep. 866.

A corporation may be a salvor as owner of the salving vessel, like other owners. It participates for the risk of its property although not personally present. The Comanche, 8 Wall. 448.

Towage may be turned into a salvage service under circumstances when the risk becomes so great as to be beyond the ordinary services of a towboat, or when the vessel towed is in distress requiring immediate assistance. A tug which extinguished a fire which broke out on board of a ship while the tug was in its service was entitled to salvage; The Connemara, 108 U. S. 352; and the towage of vessels from the neighborhood of fire on shore, by which they were exposed to danger, is treated as a salvage service and not as towage; The Rialto, 15 Fed. Rep. 124; The Cyclone, 16 *ibid.* 486; but towage of a disabled vessel after she reaches a port of safety is a towage and not a salvage service.

cluding the enforcement of liens against domestic

The *W. F. Garrison*, 1 Low. 139 ; see The *M. B. Stetson*, 1 Low. 119 ; The *I. C. Potter*, L. R. 8 A. & E. 292.

The elements which create a claim for salvage to a vessel in tow arise when in the course of towing unforeseen accidents throw upon the tug duties not within the express terms of her contract, having the effect of rescuing the tow from danger, and exposing the tug to hazard and causing additional loss of time or additional labor. *Lowndes on General Average*, 91 ; The *Galatea*, Swabey, 349 ; The *Minnehaha*, Lush. 335. Mere delay in performing a towage contract caused by unforeseen causes will not give a claim for extra remuneration. Salvage may be performed under a contract to save property in which the reward is fixed but dependent upon success. But such agreement when made under circumstances of immediate peril will be scrutinized and will not be enforced if exorbitant. The *Emulous*, 1 Sumner, 207 ; *Post v. Jones*, 19 How. 150 ; The *C. & C. Brooks*, 17 Fed. Rep. 548.

Agreements by the master for a fixed sum for the ship, leaving the salvor to obtain as much as he can from the cargo, will not be enforced, as it would open the door to fraud ; The *Westminster*, 1 W. Rob. 229-233 ; and in cases of collusion salvage is forfeited. *Ibid* ; The *C. M. Titus*, 7 Fed. Rep. 826 ; *Lowe v. The Titus*, 13 Reporter (Boston), 328 ; *Houseman v. The N. Carolina*, 15 Pet. 40. Agreements to pay for efforts to save property not dependent on success are not salvage services, but ordinary contracts of hire. *Bondies v. Sherwood*, 22 How. 214 ; The *Undaunted*, Lush. 90 ; The *Underwriter*, 4 Blatch. 94 ; The *John G. Paint*, 2 Ben. 174. See The *Independence*, 2 Curtis, 350. But towage which would otherwise have been salvage is not treated as such when the service was not completed and the condition of the vessel in dis-

vessels for supplies, services, and repairs at the

tress was not materially relieved. *The Algitha*, 17 Fed. Rep. 551.

Public vessels may be salvors. 5 Opinions Atty.-Generals, 116 ; *The Armistad*, 15 Peters, 518 ; Mr. Justice Nelson in the *Josephine*, 2 Blatch. 322 ; without deciding whether the officers and crews of naval vessels of the United States are entitled to salvage for services rendered to American vessels in distress, notwithstanding the instructions of the government on the subject ; *held*, that such services must be extraordinary and exceeding the duty imposed upon them by employment in the public service ; see, also, *The Ann Green*, 1 Gall. 274. But military salvage is payable on recapture from an enemy by national vessels. Rev. Stat. § 4652. The officers and men of a national naval vessel are under no such duty to a vessel of another nationality, and are entitled to salvage. *The Armistad*, 15 Peters, 518 ; *The Huntress*, 2 Wall. Jr. 59. Ice boats employed by a city to keep the navigation clear in ice times and other vessels used for public harbor purposes may become salvors. *The Arendal*, 14 Fed. Rep. 580 ; *The Cybele*, L. R. 3 Prob. Div. 8.

In a case reported in Cohen's Adm., p. 74, *The Huntsville*, the fire department of a city were held entitled to salvage under the circumstances of that particular case. But the members of a fire department of a city were decided not to become salvors for extinguishing a fire to a ship at the wharf. *The Mary Frost*, 2 Woods, 306. Whether the fire department of a city could claim as salvors for extinguishing a fire on board of a ship was not decided in *The Blackwall*, 10 Wallace 1, but in refusing to participate in the claim their share enured to the benefit of the owners of the vessel. See *Bartholomew v. Jackson*, 20 Wend. 18.

In awarding salvage, the amount of insurance on cargo rendered invalid by deviation is said not to be considered. But as devia-

home port when given by the law of the state.<sup>1</sup>

tion for the purpose of saving property is not justified and renders a vessel which tows another in distress, not for the purpose of saving life, an insurer of cargo. *Davis v. Garrett*, 6 Bing. 716; *Scaramanga v. Stamp*, L. R. 4 C. P. D. 316; L. R. 5 C. P. D. 295; and renders it liable for subsequent loss of cargo by a peril of the sea, this risk must be included as an element in awarding salvage. *The Farnley*, 46 L. T. (N. S.) 216; *Cockburn, C. J.*, in *Scaramanga v. Stamp*, *supra*. The owners of cargo do not participate in the salvage award. *Bond v. The Cora*, 2 Peters's Adm. 361; 2 Wash. 80; *The Nathaniel Hooper*, 3 Sumner, 542, and a vessel in tow does not participate in salvage awarded to the tug for towing another vessel found derelict. *The Ephraim and Anna*, 21 Fed. Rep. 346; *The Mary E. Long*, 7 Fed. Rep. 364; *The Sarah*, L. R. 3 P. D. 39.

In an exceptional case where the owner of the cargo was the charterer of the salvor vessel, and was on board and consented to part of the crew being detached to bring a vessel into port, and himself acted personally as salvor, the court allowed the charterer to participate also as owner of the cargo. *The Blaireau*, 2 Cranch, 240; but this case is clearly exceptional, as owners of cargo do not participate in the award. *Scaramanga v. Stamp*, *supra*.

Jurisdiction in salvage is assumed in cases of foreign vessels, *The Blaireau*, 2 Cranch, 240, and is adjudicated according to the law of the forum. *Anderson v. The Edam*, 13 Fed. Rep. 135.

The lien of the salvor is independent of possession; *The Eleanora Charlotte*, 1 Hagg. 156; *The H. D. Bacon*, 1 Newb. 274; and the improper retention of the property by the salvors

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<sup>1</sup> *The General Smith*, 4 Wheaton, 438; *St. Lawrence*, 1 Black, 522; *The Lottawana*, 21 Wall. 558. See also 12th Rule in Admiralty.

This jurisdiction *in rem* is not derived from the

from the owners may affect the salvage award. The Glasgow Packet, 2 W. Rob. 306; The Lady Worsley, 2 Spinks, 253; The Minnie Miller, 6 Ben. 117; *contra*, The Hyderabad, 11 Fed. Rep. 749, where the right of salvors to retain the possession of a vessel found derelict was sustained against the master who was in search of the vessel with a tug, but it affected the amount awarded.

The claim for salvage, it is said, cannot be enforced *in personam* against a consignee not the owner, as there is no implied promise to pay on acceptance of the cargo. The Sabine, 101 U. S. 384. See, also, Cutler v. Rae, 7 How. 729. But an owner who disposes of property saved, is personally liable—as also any person into whose hands the proceeds come for the benefit of the owner—as the subject is a maritime one, the jurisdiction of the admiralty extends to the claim whereon a personal liability existed. See 29 Adm. Rule.

A vessel is derelict when abandoned without hope of recovery or intention to return. The Island City, 1 Black, 121. Mere absence from the property with intention to return will not make the property derelict. The Cleone, 6 Fed. Rep. 517; The Arendal, 14 Fed. Rep. 580; The Hyderabad, 11 Fed. Rep. 749. Salvors of derelict property are no longer entitled to one-half or any other fixed proportion of the property. The Paquet Bot de Cayenne, 27 Leg. Int. (Pa.) 364; The Georgiana, 1 Low. 91.

It has been decided that a floating dry dock is not the subject of salvage services. Salvor Wrecking Co. v. Section Dock Company, 3 Central L. J. 640. Cope v. Vallette Dry Dock Co., 10 Fed. Rep. 142. The ground of the decision is, that such a structure is not a vessel of commerce, so as to become the subject of a maritime lien. In Bondies v. Sherwood, 22 How. 214, the court held it to be a question whether the law of maritime

statute, as no state statute can confer jurisdiction.

salvage applied to a vessel engaged in the internal trade of a state, upon a river wholly within the same. And a raft of logs adrift in the Susquehanna river was said not to be the subject of a salvage service. *Gastrel v. A Cyprus Raft*, 2 Woods, 213; *Raft of Cyprus Logs*, 1 Flippen, 543; *Tome v. Four Cuts of Lumber*, Taney, 533. On the other hand it was held that a raft adrift in the Mississippi was the subject of a salvage lien. *Muntz v. A Raft of Timber*, 15 Fed. Rep. 557. The distinction is pointed out between the lien for salvage as to such property in peril and a lien on the same subject growing out of tort. See also *U. S. v. One Raft*, 13 Fed. Rep. 796; *Fifty Thousand Feet of Timber*, 2 Low. 64. In the same manner a dismantled steamboat not fitted up for navigation, but used as a restaurant, is not the subject of the admiralty lien for salvage. *The Hendrick Hudson*, 6 Ben. 419. On the other hand, any vessel in any way connected with commerce or transportation or parts of such a vessel or of its cargo is the subject of a salvage lien, such as a barge adrift, *Seven Coal Barges*, 2 Biss. 297; *Box of Bullion*, 1 Sprague, 57; a lighter, *The General Cass*, 4 Chic. L. News, 89; a ferry boat, *Cheeseman v. Two Ferry Boats*, 2 Bond, 363; and the saving of cargo of a vessel wrecked and ashore, *A Raft of Spars*, 1 Abb. 485; *The Emulous*, 1 Sumner, 207. See *Gastrel v. A Cyprus Raft*, 2 Woods, 213. In *Tome v. Dubois* 6 Wall. 548, an action of trover by the vendees of owners of logs which had gone adrift in the Susquehanna, instructions given to the jury that the finders were entitled to a deduction for their services in saving the logs and sawing them into plank, were sustained. In this case, however, there was evidence of authorization by the owners to save the property. Courts other than those of admiralty have jurisdiction of claims between salvors where the amount has been paid to one of the salvors. *Hawkins v. Avery*, 32 Barb. 551; *McConnochie v. Kerr*, 9 Fed. Rep. 50.

But as the subject is maritime, and as such within the admiralty jurisdiction, the court enforces the remedy given by the state law,<sup>1</sup> including advances of money made to the master to relieve the ship's necessities.<sup>2</sup>

It takes cognizance of pilotage, including claims for services under the laws of a state, where the services of a pilot are tendered and refused,<sup>3</sup> such tender and refusal is said to create a lien.<sup>4</sup> wharfage,<sup>5</sup> towage,<sup>6</sup> including actions for negligence in towing a vessel between ports of the same state;<sup>7</sup> but it is otherwise held in voyages on the lakes under the act of 1845. Seamen's wages and the supervision of the contracts of

<sup>1</sup> *The Lottawana*, 21 Wall. 558; *The China*, 7 Wall. 58.

<sup>2</sup> *Thomas v. Osborn*, 19 How. 22; *The Emily Souder*, 17 Wall. 666.

<sup>3</sup> *Hobart v. Drogan*, 10 Peters, 108; *Ex parte McNiel*, 13 Wall. 236; *Steamship Co. v. Joliffe*, 2 Wall. 450; *Wilson v. McNamee*, 102 U. S. 572; *Ex parte Hagar*, 104 U. S. 520.

<sup>4</sup> *The Clymene*, 12 Fed. Rep. 346; *The Whistler*, 13 Fed. Rep. 295.

<sup>5</sup> *Ex parte Easton*, 95 U. S. 68, including the statutory liability of the consignee for wharfage of a foreign ship. *The Atlantic Dock Co. v. Wenberg*, 9 Ben. 464.

<sup>6</sup> *Sturgis v. Boyer*, 24 How. 110; *Smith v. The Creole*, 2 Wall. Jr. 485; *The Quickstep*, 9 Wall. 665.

<sup>7</sup> *The Brooklyn*, 2 Ben. 547.



seamen,<sup>1</sup> including those accruing on voyages wholly within the waters of a state.<sup>2</sup>

Masters have no lien for wages under the American law,<sup>3</sup> but the admiralty will enforce a lien given the master of a foreign ship under the law of the nation to which the vessel belongs.<sup>4</sup>

The right of a seaman to sue for his wages in admiralty, either *in rem*<sup>5</sup> or *in personam*,<sup>6</sup> is not taken away or suspended by attachment of his wages in a state court in an action at law.<sup>7</sup>

§ 21. Contracts for the building of ships are not considered maritime, and no right of lien accruing to the builder by possession or statute can be

<sup>1</sup> Sheppard v. Taylor, 5 Peters, 675. The Thomas Jefferson, 10 Wheaton, 428. As to what services are included in seamen's wages, see The Canton, 1 Spr. 437; The Ocean Spray, 4 Sawyer, 105; The Minna, 11 Fed. Rep. 759; The Ole Olesen, 20 Fed. Rep. 384; Thackeray v. The Farmer of Salem, 1 Gilpin, 524; Trainer v. The Superior, *ibid.* 514; The Wanderer, 20 Fed. Rep. 655.

<sup>2</sup> The Sarah Jane, 1 Low. 203.

<sup>3</sup> The Grand Turk, 1 Paine 73; Fisher v. Willing, 8 S. & R. (Pa.) 118; Article on Maritime Liens by Mr. Theodore Etting, 21 Am. Law. Reg. pp. 1-80-145.

<sup>4</sup> Covert v. The British Brig Wexford, 3 Fed. Rep. 577.

<sup>5</sup> The City of New Bedford, 4 Fed. Rep. 818.

<sup>6</sup> Ross v. Bourne, 14 Fed. Rep. 858; affirmed in 17 Fed. Rep. 703.

<sup>7</sup> Eddy v. O'Hara, 132 Mass. 56; see Taylor v. Carryl, 20 How. 583, as to concurrent jurisdiction of state courts and admiralty.

enforced in the admiralty,<sup>1</sup> nor can a common law lien given for supplies or materials furnished to the builder be enforced by admiralty proceedings.<sup>2</sup>

§ 22. In the same manner mortgages of vessel property as security for a loan of money or an ordinary debt, cannot be enforced in the admiralty; the contract is treated as a security for debt without any of the characteristics or attendants of a maritime loan, and without reference to navigation or the perils of the sea.<sup>3</sup> But the hypothecation of a vessel, although in the form of a mortgage as security for supplies to a vessel in a foreign port, may be enforced *in rem* in the admiralty,<sup>4</sup> while an hypothecation of the vessel by express words in a draft drawn by the master on the owners cannot be enforced in admiralty unless the debt for which the draft was given is a maritime lien.<sup>5</sup>

<sup>1</sup> *The People's Ferry Co. v. Beers*, 20 How. at 393; *Roach v. Chapman*, 22 How. 129; *Edwards v. Elliott*, 21 Wall. 532; see, also, *The Norway*, 3 Ben. 163.

<sup>2</sup> *Roach v. Chapman*, 22 How. 129; *The Norway*, 3 Ben. 163; *The Count de Lesseps*, 17 Fed. Rep. 460; *The Pacific*, 9 Fed. Rep. 120.

<sup>3</sup> *Bogart v. The John Jay*, 17 How. 399; *The Emily Souder*, 17 Wall. 666; *The C. C. Trowbridge*, 14 Fed. Rep. 874.

<sup>4</sup> *The Hilarity*, Bl. & H. 90.

<sup>5</sup> *The Woodland*, 104 U. S. 180. Jurisdiction to enforce the mortgage of a ship is now conferred on the English admiralty

But the mortgagee, although not entitled to sue in admiralty, has a right to intervene in the surplus proceeds in the registry, and the fund will be awarded to him as such,<sup>1</sup> and he may appear as a claimant to the libels presented against the vessel, and defend his interest therein and also sue for his interest therein as mortgagee against a tortfeasor as in collision.<sup>2</sup>

So that a party may intervene as claimant of the vessel and defend the action, or proceed against the funds in the registry of the court, arising from the sale of a vessel, who could not file a libel as an actor in a cause originated by himself.<sup>3</sup>

The right of a mortgagee to obtain possession of a vessel in an action brought for the possession against the mortgagor was sustained by Judge Betts.<sup>4</sup> But the current of authority is against such a jurisdiction, and that no remedy can be enforced in admiralty growing out of the relation of mortgagor and mortgagee, although the right

by statute of 3 & 4 Vic. ch. 65; see suggestion of Wayne, J., in *Bogart v. The John Jay*, 17 How. 399.

<sup>1</sup> *Rodd v. Heartt*, 17 Wall. 354; *The Lottawana*, 21 Wall. 558; *The Monticello*, 17 How. 152; *The Guiding Star*, 18 Fed. Rep. 263; *The De Smet*, 10 Fed. Rep. 483.

<sup>2</sup> *The Grand Republic*, 10 Fed. Rep. 398; *Schuchardt v. The Angelique*, 19 How. 239; see, also, Admiralty Rules, 34-43.

<sup>3</sup> See *post.*, Chap. VI.

<sup>4</sup> *The J. B. Lunt*, 11 N. Y. Leg. Obs. 137.

of possession of the mortgaged vessel only is involved.<sup>1</sup>

§ 23. The admiralty, when a dispute arises as to the employment of a ship between part owners, will allow the majority in interest to send the ship to sea on security being given to the dissentient minority, equal to the value of their interests, for the safe return of the vessel.<sup>2</sup> But the jurisdiction is exercised only when the title is legal and the shares are ascertained.<sup>3</sup> But those not consenting

<sup>1</sup> The *John Jay*, 3 Blatch. 67; *Britton v. The Venture*, 21 Fed. Rep. 928. A mortgagee who has foreclosed his mortgage cannot maintain an action to get possession of the vessel. The *Wm. D. Rice*, 3 Ware, 134; The *Martha Washington*, 3 Ware, 245; nor can the mortgagor proceed in admiralty to obtain possession of the vessel where it has been delivered to the mortgagee, although the indebtedness has been liquidated. The *C. C. Trowbridge*, 14 Fed. Rep. 874; nor has the admiralty jurisdiction of a possessory action brought by a mortgagee of part owners against other part owners who ejected him when he took possession upon the breach of the condition of the mortgage. *Morgan v. Tapscott*, 5 Ben. 252.

<sup>2</sup> Abbott on Shipping, Part I. Chap. III. § 3; Story on Part. § 428; 3 Kent (5th ed.), 151; *Steamboat Orleans v. Phœbus*, 11 Peters, 175; *Willings v. Blight*, 2 Peters's Adm. 288.

<sup>3</sup> *Kellum v. Emerson*, 2 Curtis, 79; The *C. C. Trowbridge*, 14 Fed. Rep. 874; The *Amelia*, 6 Ben. 475; The *Wm. D. Rice*, 3 Ware, 134; *Knyock v. The S. C. Ives*, Newb. 205; The *Perseverance*, 1 Bl. & How. 385; *Davis v. Child*, 2 Ware, 78; 3 Kent's Com. 152.

bear no part of the expenses of the outfit, and are not entitled to share in the profits of the undertaking; but the ship sails wholly at the charge and risk and for the profit of the others.<sup>1</sup>

And it is said that when the majority refuse to employ the vessel, it will be delivered to the minority for the purpose of employment on security being given to protect the other dissenting owners.<sup>2</sup> In causes of possession the court presumes that all the owners who do not support the application are content that the possession of the vessel shall not be disturbed.<sup>3</sup> If the interests of the owners be equal, and one party refuses to allow the employment of the ship, the willing owners may, upon giving the usual security, have the ship delivered to them for their employment.<sup>4</sup>

The proper and only safe course for a dissenting owner is to apply to the admiralty for security for the safe return of the vessel; for if the ship be sent to sea by the owners assenting to its employment

<sup>1</sup> Abbott on Shipping, Part I. Chap. III., § 3; 2 Parsons on Mar. Law, 558; Coyne v. Caples, 8 Fed. Rep. 638; 3 Kent's Com. 151.

<sup>2</sup> Per Story, J., in *The Orleans v. Phoebus*, 11 Peters, 175; *Tunno v. The Betsina*, 5 Am. Law Reg. 406.

<sup>3</sup> *The Valiant*, 1 Wm. Rob. 64.

<sup>4</sup> Story on Part. § 435; *Davis v. The Brig Seneca*, 18 Am. Jurist, 486-490; 3 Kent Com. 152; see, *contra*, 2 Pars. Mar. Law, 555, note 4.

without such security, and she is lost without any tortious act of those who favor the adventure, the dissenting owners have no remedy either at law or in equity.<sup>1</sup> But such arrest is not essential; if a part owner expressly notifies his dissent, he is not liable for a contribution to a loss as between his part owners.<sup>2</sup> Nor will he incur a personal liability to third parties for supplies or injuries when he is deliberately excluded by the others from all participation and interest in the voyage,<sup>3</sup> as the principles which govern agency will not charge him personally for the acts of others, although the liability *in rem* of the vessel of which he is a part owner may be incurred. The owners employing the vessel will, in the absence of circumstances which create an estoppel, alone be liable as owners *pro hac vice* to third parties in the same manner as those are who charter and sail the vessel under a charter party on agreement with the other part owners.<sup>4</sup>

The application to the admiralty, however, is conclusive evidence of a dissent which otherwise

<sup>1</sup> Abb. on Shipping, Part I. Ch. III. § 3, p. 100; Gould v. Stanton, 16 Conn. 12.

<sup>2</sup> Abbott on Shipping, Part I. Ch. III. § 3, p. 101.

<sup>3</sup> Scull v. Raymond, 18 Feb. Rep. 547.

<sup>4</sup> Thorp v. Hammond, 12 Wall. 408; Sproul v. Hemmingway, 14 Pick. 1.

might be disputable both as to third parties and part owners, as any acts indicating an intention to participate in the voyage would be sufficient to charge the owner with responsibility.<sup>1</sup> After seeking the protection of the admiralty, the dissenting owner is not liable for any expenses or losses, nor is he entitled to any of the earnings of that voyage.<sup>2</sup>

The security is said to be given only for the safe return of the ship, and that the minority does not receive payment for the ordinary wear and tear, as that would amount to taking an account of which the admiralty has no jurisdiction.<sup>3</sup> The bond contemplates no other object than the return of the ship, or, in default thereof, the payment of the stipulated sum.<sup>4</sup> In a case where a bond had been given and the vessel returned to England in distress, and had been arrested in a suit for salvage and wages, the court refused to pronounce the bond forfeited.<sup>5</sup> Whether, if the vessel was sold for salvage or wages, such sale would have amounted to a destruction or loss, was not decided. But a loss of the property by expenses incurred while in the

<sup>1</sup> *Scull v. Raymond*, *ante*, 1 Pars. Mar. Law, 128.

<sup>2</sup> *Gould v. Stanton*, 16 Conn. 12.

<sup>3</sup> *The Margaret*, 2 Hagg. 275.

<sup>4</sup> *The Apollo*, 1 Hagg. 307, at p. 312.

<sup>5</sup> *The Margaret*, 2 Hagg. 275.

possession of owners would be equivalent to physical destruction. But a part owner who objects to the employment of the vessel, is liable for expenses incurred for repairs of the vessel by the other part owners before his application for the arrest.<sup>1</sup> The majority of owners may dismiss the master and resume the possession of their vessel, although the master is a part owner.<sup>2</sup> The dismissal of the master, where he is engaged for no particular voyage, may be without assigning any cause, but where there is a charter party, bills of lading and a particular voyage agreed upon, although the owners may dismiss, yet they would be liable in a common law action.<sup>3</sup> An agreement that the master shall sail the vessel on shares, unless it amounts to an actual charter for a given space of time, will not be enforced, as it is against the policy of the law to restrain the exercise of the discretion of the owners in the selection of the master.<sup>4</sup> Nor will the purchase of a master's share entitle the master to retain the possession as master.<sup>5</sup>

<sup>1</sup> *Davis v. Johnston*, 4 Sim. 589.

<sup>2</sup> *The Clayton v. Eliza B. Emory*, 4 Fed. Rep. 342.

<sup>3</sup> *Montgomery v. Henry*, 1 Dall. 49 ; *Montgomery v. Wharton*, Bee's Rep. 388

<sup>4</sup> *Card v. Hope*, 2 B. & C. 661 ; *Ward v. Ruckman*, 36 N. Y. 26.

<sup>5</sup> *Williams v. Ireland*, 2 W. N. C. (Pa.) 442.



It is said that the admiralty has no power to compel a sale by a part owner who unreasonably refuses to act.<sup>1</sup> Such a sale was decreed to effect a division between two equal part owners.<sup>2</sup> Mr.

<sup>1</sup> *The Orleans v. Phœbus*, 11 Peters, 175; *Duston v. Hebden*, 1 Wils. 101; *Dimmock v. Chandler*, 2 Strange, 890. In *Davis v. The Seneca*, 1 Gilpin, 10, the district court refused to order a sale where the owners were equally divided as to the employment of the vessel in a particular enterprise, but on appeal the circuit court decreed a sale. Appendix to 3 Wall., Jr. 395; 18 Am. Jurist, 486 (1838). In the case of *The Seneca (ante)* the respondent was a half owner and master in possession and insisted on fitting the vessel out for another voyage and going in her as master. The other half owners refused to allow the vessel to go on any voyage with the respondent as-master. The parties being equal in interest and in their right to control the employment of the ship and the appointment of the master, the effect of the disagreement was, as Mr. Justice Washington points out, that the vessel must remain unemployed, since neither owner can otherwise than tortiously send her to sea against the will of the other. This was the controlling reason for ordering the sale.

The rules governing the ordering of a sale on the disagreement of equal part owners are stated as, *first*, the disagreement must be such as prevents the present employment of the ship in navigation; and *secondly*, that the objecting moiety asking for a sale must either propose different employment for the ship, or if they thereby object to the voyage or the master proposed by the other moiety, their objection must be based upon reasonable grounds. *The Seneca*, reported in Appendix to 3 Wall. Jr. 395; see, also, Judge Peters's opinion in *Willings v. Blight*, 2 Peters's Adm. 288.

<sup>2</sup> *Skrine v. The Hope*, Bee's R. 2.

Justice Story strenuously contends for the right of the admiralty to order a sale on disagreement between part owners.<sup>1</sup> The right of the admiralty to sell was asserted by Judge Blatchford in *The Ocean Belle*,<sup>2</sup> by Choate, D. J., in the ship *Annie H. Smith*,<sup>3</sup> but was not enforced under the circumstances of the case.

In a libel, by the owners of five-sixteenths of a vessel, setting forth a disagreement between the owners, that the vessel had incurred an indebtedness to the libellants for repairs and also mismanagement by the ship's husband, whereby the joint property was depreciating; and alleging also an offer to buy or sell on the same terms which had been refused, and praying a decree for the sale of the vessel for the benefit of her creditors and her owners, the proceeds to be applied, first, to the payment of all her just debts, and the balance to be distributed among her owners, the court *held* that there was no power to order a sale under such circumstances.<sup>4</sup>

The admiralty, however, exercised the power of sale, in proceedings between part owners, by con-

<sup>1</sup> Story on Part., §§ 435 to 439; see, also, *Willings v. Blight*, 2 Peters's Adm. 288.

<sup>2</sup> 6 Ben. 253.

<sup>3</sup> 10 Ben. 110.

<sup>4</sup> *The Ocean Belle*, 6 Ben. 253.

sent.<sup>1</sup> The power to sell a vessel, in a dispute between part owners, must still be considered unsettled in America.<sup>2</sup>

In England, by the admiralty act of 1861, "the High Court of Admiralty, in all questions between part owners, may direct the ship or any part thereof to be sold, and may make such order in the premises as to them shall seem fit,"<sup>3</sup> and it may be exercised in favor of a minority against the opposition of the majority in interest.<sup>4</sup> In cases of wreck the admiralty has jurisdiction to decree a sale on the application of the master.

§ 24. It is generally assumed that the admiralty has no jurisdiction in causes of possession between foreign owners. Lord Stowell refused to entertain such a cause, because by entertaining the suit, he might deprive the parties of those rights to which they were entitled by the laws of their own country as administered in those courts;<sup>5</sup> but it will entertain such jurisdiction where a court, or the au-

<sup>1</sup> The *John E. Mulford*, 18 Fed. Rep. 455.

<sup>2</sup> *Tunno v. The Betsina*, 5 Am. L. Reg. 406; *Lewis v. Kinney*, 5 Dill. 159; *contra*, *Coyne v. Caples*, 8 Fed. Rep. 638.

<sup>3</sup> See the *Law of Merchant Shipping*, by James T. Foard, 36.

<sup>4</sup> *The Nelly Schneider*, L. R. 3 P. D. 152.

<sup>5</sup> *The Tilton*, 5 Mason, 465.

<sup>6</sup> *The Johan & Siegmund*, Edwards, 242; *The See Reuter*, 1 Dodson, 22.

thorities of the country to which the ship belongs have passed upon the right.<sup>1</sup>

Such a decree is considered as a consent of the accredited agents of the government to the suit which the court will otherwise entertain under such circumstance only by consent of the parties.<sup>2</sup>

The question has not been finally decided in the United States whether this jurisdiction will be exercised in suits between foreign owners; but the same reasons which induce the admiralty to entertain jurisdiction *in rem* between foreigners in relation to contracts and torts, growing out of the employment of such vessels<sup>3</sup> should induce the courts to enforce the rights of foreign owners, either as between themselves or as against other parties wrongfully retaining possession of vessels against the consent of the owners. The reluctance to entertain suits *in rem* as to foreign vessels has disappeared.<sup>4</sup>

In an early case,<sup>5</sup> in a suit on a bottomry bond on a Greek vessel, where all parties were subjects of the Ottoman Porte, the reasons which induced Judge Story to take jurisdiction *in rem* between

<sup>1</sup> The *See Reuter*, 1 Dodson, 22; The *Martin of Norfolk*, 4 C. Rob. 293; The *Evangelistria*, L. R. 2 P. D. 241.

<sup>2</sup> The *Agincourt*, L. R. 2 P. D. 239.

<sup>3</sup> The *Maggie Hammond*, 9 Wall. 435.

<sup>4</sup> See *post*.

<sup>5</sup> The *Jerusalem*, 2 Gall. 191.

foreigners are equally applicable to causes of possession. Mr. Justice Story held that the proper forum is the *locus rei sitæ*, as remitting the defendant to the domestic forum is practically refusing redress. He was unable to see how the exercise of such judicial authority clashed with the principles of public policy; and he thought the refusal might well be deemed a disregard of national comity, inasmuch as it would be withholding from a party the only effectual means of obtaining his rights. The same reason was given by Dr. Lushington when entertaining proceedings *in rem* for collision against a foreign vessel.<sup>1</sup> This reasoning applies with equal force to proceedings by owners to enforce their rights in ships in foreign tribunals. If admiralty tribunals refuse to entertain such causes, owners must be at the mercy of masters and charterers, who, by refusing to return the vessel to the country to which it belongs, could practically withhold indefinitely the possession of the vessel.

Jurisdiction has, accordingly, been entertained in a cause of possession by the owners of a foreign vessel against the master who claimed to retain under a lien for wages and advances.<sup>2</sup>

<sup>1</sup> The *Johann Friedrich*, 1 Wm. Rob. 36.

<sup>2</sup> The *Brisk*, 4 Ben. 252.

§ 25. Although a court of admiralty is in many respects a court of equity acting in maritime affairs, it has no chancery powers.<sup>1</sup> Its jurisdiction differs from that of a court of equity.<sup>2</sup> It has no jurisdiction to enforce a trust, or an equitable title to a vessel.<sup>3</sup>

It does not entertain a libel for the specific performance of a contract;<sup>4</sup> nor to decree the cancellation or surrender of an incumbrance on the ground that it has been paid;<sup>5</sup> nor to change a written agreement, or to compel the execution of one;<sup>6</sup> nor has it jurisdiction of matters of account between part owners.<sup>7</sup>

<sup>1</sup> *Dean v. Bates*, 2 Wood. & M. 87.

<sup>2</sup> *Kellum v. Emerson*, 2 Curtis, 79.

<sup>3</sup> *The William D. Rice*, 3 Ware, 134; *The Amelia*, 6 Ben. 475; *The C. C. Trowbridge*, 14 Fed. Rep. 874; *Knyock v. The S. C. Ives*, Newb. 205; *The Perseverance*, 1 Bl. & How. 385; *Davis v. Child*, 2 Ware, 78; *Kellum v. Emerson*, 2 Curtis, 79.

<sup>4</sup> *Knyock v. The S. C. Ives*, Newb. 205; *Davis v. Child*, 2 Ware, 78; *Deely v. The Ernest and Alice*, 2 Hughes, 70; *The William D. Rice*, 3 Ware, 134.

<sup>5</sup> *Dean v. Bates*, 2 Wood. & M. 87; *The C. C. Trowbridge*, 14 Fed. Rep. 874.

<sup>6</sup> *The Perseverance*, 1 Bl. & How. 385; *Andrews v. Essex M. Ins. Co.*, 3 Mason, 6.

<sup>7</sup> *The Orleans v. Phœbus*, 11 Peters, 175; *Ward v. Thompson*, 22 How. 330; *Grant v. Poillon*, 20 How. 162; *Minturn v. Maynard*, 17 How. 477; *The Marengo*, 1 Low. 52; *The C. C. Trowbridge*, 14 Fed. Rep. 874; *The Apollo*, 1 Hagg. 307.

Although the services are a subject matter within its jurisdiction, yet if they are to be compensated for only by forming an item in an account between part owners, they must go with the principal subject, to which they are merely an incident, and find their compensation in another jurisdiction which is competent to examine and adjudicate the whole subject.<sup>1</sup> But in the exercise of its jurisdiction it may take an account when such accounting is only incidental.<sup>2</sup> And an account can be taken of a vessel's earnings against a former managing part owner, who is also a claimant on the fund, and entitled to share in the proceeds of the sale of a vessel under a decree in the cause; as an incident to the just distribution of the proceeds;<sup>3</sup> but as between strangers, and one of the parties to a suit in possession, it cannot be taken.<sup>4</sup>

Where a seaman agrees to serve for one-half the earnings and profits of the vessel, he cannot maintain an action *in rem* until the account has been settled and reduced to a certainty;<sup>5</sup> but where the

<sup>1</sup> *Kellum v. Emerson*, 2 Curtis, 79; *Grant v. Poillon*, 20 How. 162; *Hall v. Hudson*, 2 Sprague, 65; see *The Apollo*, 1 Hagg. at p. 314.

<sup>2</sup> *Kellum v. Emerson*, 2 Curtis, 79; *Tunno v. The Betsina*, 5 Am. Law Reg. 406.

<sup>3</sup> *The John E. Mulford*, 18 Fed. Rep. 455.

<sup>4</sup> *Daily v. Doe*, 3 Fed. Rep. 903.

<sup>5</sup> *The Fairplay*, 1 Bl. & How. 136.

libel by a seaman avers that a specific sum has come into the hands of the respondent, as his share of the proceeds of the voyage—the court will entertain a suit *in personam*—and will inquire into the validity of charges made by the respondent against libellant;<sup>1</sup> but will not entertain a libel *in personam* to bring the respondent to a general accounting for the proceeds of the voyage, and to compel an adjustment of the proportion in which the libellant is to share.<sup>2</sup> If it is apparent that the main object of the libel is to settle an account, the libel will be dismissed.<sup>3</sup> No libel will be entertained between ship owners to collect a balance, to be determined on the settlement of the joint accounts of the parties.<sup>4</sup> Whenever the question of the employment of a vessel is one of partnership, the admiralty has no jurisdiction,<sup>5</sup> although one of the parties is a joint owner.<sup>6</sup>

With regard to the ownership of ships, joint owners are not partners as to the ship itself, unless by special agreement,<sup>7</sup> while, as regards the adven-

<sup>1</sup> *Duryee v. Elkins*, Abb. Adm. 529.

<sup>2</sup> *Ibid.*

<sup>3</sup> *The Larch*, 3 Ware, 28.

<sup>4</sup> *Martin v. Walker*, Abb. Adm. 579; *Ward v. Thompson*, 22 How. 380.

<sup>5</sup> *Vandewater v. Mills*, 19 How. 82.

<sup>6</sup> *Grant v. Poillon*, 20 How. 162; *Kellum v. Emerson*, 2 Curtis, 79.

<sup>7</sup> 8 Kent's Com. 151, etc.



ture, they are treated as partners, so that freight is treated as a partnership asset; and the gross freight is liable for the expenses of the voyage;<sup>1</sup> but an agreement to sail a vessel on shares does not create a partnership.<sup>2</sup>

§ 26. This jurisdiction, as far as it concerns torts, depends entirely upon the locality,<sup>3</sup> but it must be committed on the water and not on the land. An injury to a bridge or a permanent structure in a navigable stream by a vessel is not within the admiralty jurisdiction,<sup>4</sup> while an injury to a vessel by a bridge or other obstruction placed in the same stream is,<sup>5</sup> although it creates no lien.<sup>6</sup>

<sup>1</sup> 1 Pars. Mar. Law, p. 96, n. 1; Story on Part. § 419; *Mumford v. Nicholl*, 20 Johns. 611; *Harding v. Foxcroft*, 6 Greenl. (Me.) 76; *Phillips v. Purington*, 15 Me. 425.

<sup>2</sup> *Webb v. Pierce*, 1 Curtis, 104.

<sup>3</sup> *Waring v. Clarke*, 5 How. 441; *The Genesee Chief*, 12 How. 443; *Fretz v. Bull*, 12 How. 466; *The Commerce*, 1 Black, 574.

<sup>4</sup> *The Maud Webster*, 8 Ben. 547; *The Neil Cochran*, 1 Brown's Ad. Rep. 162; *The Ottawa*, 1 Brown's Ad. 356. See, also, *The Arkansas*, 17 Fed. Rep. 383, where the reciprocal right of action for injury by a vessel to a lawful structure in a stream is asserted, but the right was held not to extend to an injury by a vessel to a structure on land, when by the overflow of the river the navigation extended beyond the ordinary high-water mark.

<sup>5</sup> *The P. W. & B. R. R. Co. v. The P. & H. de Grace St. Tow boat Co.*, 23 How. 209; *Atlee v. The Packet Co.*, 21 Wall. 389; 2 Brown's Civil and Adm. Law, 203.

<sup>6</sup> *The Rock Island Bridge*, 6 Wall. 213.

So that the owners of a dock are liable for damage suffered by a vessel lawfully using the dock and caused by a defect in the bottom known to the owners of the dock.<sup>1</sup>

Damages by fire communicated from a burning ship to a structure on land are not cognizable in admiralty,<sup>2</sup> nor is an injury to a person or property on a wharf by a passing vessel, nor injury to the wharf itself;<sup>3</sup> it has jurisdiction of an action for damages to a floating dry dock, although it is moored to land by an attachment to the water side,<sup>4</sup> but it is held to have no jurisdiction for salvage services to such a structure.<sup>5</sup>

But the extension of the admiralty jurisdiction so as to include injuries suffered by bridges and wharves from passing vessels seems desirable, although perhaps not within the power of the Supreme Court to promote by rules. The construction which treats such injuries as not within the

<sup>1</sup> *Sawyer v. Oakman*, 1 Low. 134.

<sup>2</sup> *The Plymouth*, 3 Wall. 20.

<sup>3</sup> *The Ottawa*, 1 Bro. Ad. Rep. 356; *The Maud Webster*, 8 Ben. at 554; *The Mary Stewart*, 10 Fed. Rep. 137; *The C. Accame*, 20 Fed. Rep. 642.

<sup>4</sup> *The Ceres*, 7 W. N. C. (Pa.) 576.

<sup>5</sup> *Cope v. The Vallette Dry Dock*, 10 Fed. Rep. 142; *The Salvor Wrecking Company v. The Section Dry Dock Co.*, 3 Cent. L. J. 640; contra, *Muntz v. A Raft of Timber*, 15 Fed. Rep. 557.

maritime law of the United States is a narrow one, like that by which the admiralty at one time refused to take jurisdiction in contracts of afreightment because made on the land, although the services in their nature were maritime and were to be performed upon the sea.

§ 27. The jurisdiction dependent on locality extends to all the navigable waters of the United States, whether affected by the tide or not; jurisdiction is not denied by the fact that the waters lie within the body of the county or that the vessel was engaged in the internal commerce of a state.<sup>1</sup>

It extends to collisions on canals communicating with navigable waters of the United States.<sup>2</sup>

What are navigable waters of the United States upon which seizure can be enforced in admiralty depends upon their navigability in fact, as a means of communication in interstate or foreign commerce. There are certain rivers which are considered as domestic rivers of the states and not within the domain of the national law.<sup>3</sup> But the circumstance that a river lies within the boundary

<sup>1</sup> *The Commerce*, 1 Black, 574; *Fretz v. Bull*, 12 How. 466; *The Genessee Chief*, 12 How. 443; *The Daniel Ball*, 10 Wall. 557.

<sup>2</sup> *Ex parte Boyer*, 109 U. S. 629.

<sup>3</sup> *The Montello*, 11 Wall. 411; *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245; *Gibbons v. Ogden*, 9 Wh. at 194.

of a state will not prevent the admiralty jurisdiction attaching to a vessel navigating it. Whenever a river forms by itself or its connections a continuous highway over which commerce is or may be carried with other states, or foreign countries in the customary mode, it is a navigable water of the United States, upon which seizures may be enforced by admiralty process against vessels, although engaged in the domestic trade of a state.<sup>1</sup>

Although municipal regulations affect the right to a remedy in the admiralty when the injury is committed on waters embraced within the jurisdiction of the state,<sup>2</sup> yet the statutes of a state, as regulations of navigation within the waters of the state, are not binding on the courts of admiralty,<sup>3</sup> while harbor regulations<sup>4</sup> as to the position of lights to be shown by vessels at anchor and pilotage laws, which are regulations of the port,<sup>5</sup> are binding in the admiralty on shipping.

<sup>1</sup> *Jackson v. The Magnolia*, 20 How. 296; *The Montello*, 11 Wall. 411; *Hine v. Trevor*, 4 Wall. 555; *The Daniel Ball*, 10 Wall. 557; *In re Long Island Trans. Co.*, 5 Fed. Rep. 599.

<sup>2</sup> *Ex parte Gordon*, 104 U. S. 515; *Ex parte McNiel*, 13 Wall. 236; *The Highland Light*, Chase's Dec. 150; *The Sylvan Glen*, 9 Fed. Rep. 335; *Holmes v. The O. & C. R. R. Co.*, 5 Fed. Rep. 75; *The Genesee Chief*, 12 How. 443.

<sup>3</sup> *The New York v. Rea*, 18 How. 223; *The Russia*, 3 Ben. 471.

<sup>4</sup> *The James Gray v. The John Frazer*, 21 How. 184.

<sup>5</sup> *The China*, 7 Wall. 53; *Wilson v. McNamee*, 102 U. S. 572.

The remedy may be enforced in whatever district the offending vessel is found, without regard to the place where the wrong is committed.<sup>1</sup>

§ 28. The current decisions show that actions arising from death are cognizable in the admiralty where the cause occurred within the jurisdiction of a state, if the laws in force in that locality give such a right of action.<sup>2</sup> It has not yet been decided in the Supreme Court whether the admiralty has jurisdiction for such a cause of action when arising upon the high seas, although such actions have been sustained for the loss of life occurring by collisions at sea.<sup>3</sup> In *The E. B. Ward, Jr.*,<sup>4</sup> it was held that where the laws of the state where the owners of the vessel resided created a liability for death, the remedy could be enforced in admiralty,

<sup>1</sup> *The Commerce*, 1 Black, 574; *The Betsey and Charlotte*, 4 Cranch, 443; *The Ann*, 9 Cranch, 289.

<sup>2</sup> *The Steamboat Co. v. Chase*, 16 Wall. 522; *Sherlock v. Alling*, 93 U. S. 99; *Crapo v. Allen*, 1 Sprague, 184; *Hiner v. The Sea Gull*, 2 Am. Law Times, 15; *Holmes v. The O. & C. R. R. Co.*, 5 Fed. Rep. 75; *Cutting v. Seabury*, 1 Sprague, 522; *The Sylvan Glen*, 9 Fed. Rep. 335; *The Manhasset*, 18 Fed. Rep. 918; *In re Long Island Trans. Co.*, 5 Fed. Rep. 599; *The Epsilon*, 6 Ben. 378; *The Garland*, 5 Fed. Rep. 924.

<sup>3</sup> *The Towanda*, 34 Leg. Int. (Pa.) 394, followed in *The Harrisburg*, 15 Fed. Rep. 610; *The E. B. Ward, Jr.*, 17 Fed. Rep. 456. See, also, *McDonald v. Mallory*, 77 N. Y. 546.

<sup>4</sup> 17 Fed. Rep. 456.

on the ground that the vessel is a part of the territory of the state to which she belongs and carries with her the laws of the state upon the high seas, and the same effect was given to the laws of the state of New York, over a ship owned in that state, in the courts of that state.<sup>1</sup> Although, in *Crapo v. Kelly*,<sup>2</sup> the same view is taken in the opinion of the court, in giving effect to an assignment under the insolvent laws of Massachusetts, where the owners resided, as to the title of a vessel at sea, it had reference only to the subject involved, *i. e.*, the laws governing the transfer of personal property by insolvency of owners as applied to vessels while on the ocean. The decision depended upon the principle that the situs of the property was that of the owner, and therefore the comity which would give extra territorial effect to a transfer under the insolvent laws of Massachusetts, where the owners resided, transferred his property at sea. This is pointed out by Justice Bradley in his dissenting opinion, who says: "But whether that rule could be applied at all, as between the different states of the Union, to vessels belonging to citizens of the United States which are properly vessels of the United States and not of particular states, need not be decided."

<sup>1</sup> *McDonald v. Mallory*, 77 N. Y. 546.

<sup>2</sup> 16 Wall. 610.

Although a pilot boat carries with her the pilotage laws of the port in whose service the pilots are licensed upon the high seas,<sup>1</sup> because the vessel is in the public service of the state—pilotage laws being regulations of the port, to which a vessel bound to such a port becomes subject,<sup>2</sup> and in the same manner liens given by the local law of a state become a right of property according to the laws of the port or of the *rei sitae*, which follow the vessel and govern not only as to maritime liens but as to liens of all kinds,<sup>3</sup> yet as far as the relations of a vessel to her nationality is concerned, foreign courts could only recognize the law of the United States as governing the vessel when upon the high seas, regarding only the laws of the state or port where the *lex rei sitae* properly applied.<sup>4</sup>

Such a cause of action was not contemplated by the framers of the constitution, within the meaning of the grant of admiralty and maritime jurisdiction, as such a cause of action was not known to exist.<sup>5</sup>

The first act giving damages for death is that known as Lord Campbell's Act, and it has been generally enacted in the different states of the

<sup>1</sup> *Wilson v. McNamee*, 102 U. S. 572.

<sup>2</sup> *The China*, 7 Wall. 53.

<sup>3</sup> Wharton's *Conflict of Laws*, § 324.

<sup>4</sup> See *Pope v. Nickerson*, 3 Story, 465.

<sup>5</sup> *Ins. Co. v. Brame*, 95 U. S. 754.

Union. These acts can, however, have no extra territorial jurisdiction,<sup>1</sup> and such a cause of action is believed to be unknown to the general maritime law, as it certainly was to that system of maritime law adopted in the admiralty courts of the United States, under the constitutional grant in maritime causes.<sup>2</sup>

<sup>1</sup> *Whitford v. The Panama R. R. Co.*, 23 N. Y. 465; *The State v. The R. R. Co.*, 45 Maryland, 41; *Selma R. R. Co. v. Lacy*, 43 Ga. 461; *Mahler v. Norwich & N. Y. Trans. Co.*, 30 How. P. R. (N. Y.) 237.

<sup>2</sup> *Steamboat Co. v. Chase*, 16 Wall. 522. See an article called "Can damages for causing death be recovered independently of any statute?" by R. C. McMurtrie, 16 Am. L. Rev. 128. In the absence of legislation by congress it is doubtful whether such an action would lie for death occurring on the high seas, either in the admiralty or in the common law courts. The general maritime codes, the laws of Oleron, of Wisbuy, of the Hanse Towns or the *Ordonnance de la Marine* (see Peters's Adm. Dec., where these laws are printed in full) do not give an action for death, and it seems to be the understanding of leading text-writers on maritime law that such actions do not survive the death of the person injured (*Benedict's Adm.* 2d ed. 309; 2 *Parsons' Maritime Law*, 351; *Hall's Adm.* 21; *Dunlap's Adm.* 87). Foreign vessels could not come within the provisions of such an act. Nor would such a right be enforced against foreigners, unless such rights existed by the laws of their nationality. *The Gaetano & Maria*, L. R. 7 P. D. 137; *the Maggie Hammond*, 9 Wall. 435; *The Queen v. Keyn*, L. R. 2 Exch. Div. 63. See *James v. S. W. Ry.*, L. R. 7 Exch. 287, and *Simpson v. Blues*, L. R. 7 C. P. 290.

It might be a doubtful policy to create such a liability in case of



§ 29. The act of 1789 gave the District Courts of the United States exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, within their respective limits, as well as upon the high seas."<sup>1</sup>

Seizures in revenue causes are now cognizable by the admiralty when made on all navigable waters of the United States.<sup>2</sup>

The omission of the words "ten tons" burden or upwards, in the clause of section 560 of the Revised Statutes, was suggested probably by the decisions,<sup>3</sup> which asserted the constitutional grant to be independent of legislative restriction; as in the

a collision with a foreign vessel—where a reciprocal right is not given by the foreign law—for the death occurring on board the American vessel by the same collision. Nor in case of unliquidated damages for death or personal injuries is the extension of the admiralty procedure in all respects desirable. The concurrence of a jury, under the control of the court, is perhaps the best way of arriving at so uncertain a result as damages for personal torts, especially those resulting in death.

<sup>1</sup> U. S. Stat. at Large, 76.

<sup>2</sup> U. S. v. The Missouri, 9 Blatch. 433.

<sup>3</sup> The Genesee Chief, 12 How. 443; The Commerce, 1 Black, 574; Fretz v. Bull, 12 How. 466.

case of the act of 1845, extending jurisdiction to the great lakes. But the exercise of admiralty jurisdiction in revenue causes is not derived from the patent of the judge nor from the ancient customary jurisdiction of the prerogative of the crown in the person of its lord high admiral. The first statute which placed judgments of revenue in the plantations within the courts of admiralty is the 12th Charles the Second, chapter 28, sec. 1, which was followed by subsequent statutes.<sup>1</sup>

The clause granting jurisdiction to the District Courts of all seizures made on land and on all waters not within the admiralty and maritime jurisdiction was conferred by the act of 1789,<sup>2</sup> so that even under the views expressed as to the extent of the constitutional grant of admiralty jurisdiction to the United States, the right of the legislature to control the extent of this jurisdiction in such causes could not be doubted.

Jurisdiction over seizures on water for breach of the revenue laws are stated to have been uniformly exercised by the colonial courts of vice admiralty before the Revolution.<sup>3</sup> But the exercise of this power by the vice-admiralty courts was one of the

<sup>1</sup> Sir James Marriott, in the *Columbia*, 1 *Collectanea Juridica*; see, also, 8 Wheaton, 396, note *a*.

<sup>2</sup> 1 *Statutes at Large*, 76.

<sup>3</sup> The *Sarah*, 8 Wheaton, 396, n. *a*.

grievances of the colonies against the mother country.<sup>1</sup> This arose not from the form of the procedure, but from political considerations. Yet as early as 1789, in the first session of congress after the adoption of the constitution, the clause of the judiciary act was passed investing the admiralty courts established under the constitution with the powers given to the vice-admiralty courts in the colonial times.<sup>2</sup>

In addition to the ordinary appeal to the Circuit Court, however, congress gave to the Supreme Court the summary remedy by writs of prohibition to the District Courts, when sitting as courts of admiralty, to prevent any abuse in the exercise of the admiralty jurisdiction conferred either by the constitutional grant, or under the provisions of the judiciary act.<sup>3</sup>

In seizures made upon land the District Court proceeds as a court of common law, according to the course of the exchequer in actions *in rem*, and not as a court of admiralty. In seizures made upon the water the court sits as a court of admiralty.

<sup>1</sup> Lecky's England in the Eighteenth Century, vol. iii. p. 445.

<sup>2</sup> See argument of Mr. Greene, in the New Jersey Steam Nav. Co. v. The Merchants' Bank, 6 How. 344.

<sup>3</sup> Act of September 24, 1789, R. S., § 688. See *post*, Chapter VII. as to the writ of prohibition.

In seizures upon land the trial must be by jury, while in seizures within the admiralty jurisdiction in the same court, the trial is by the court.<sup>1</sup>

The clause, "saving to suitors in all cases the right to the common law remedy, where the common law is competent to give it," is not an exception from the admiralty power conferred upon the District Courts, but was inserted lest the exclusive terms in which the power was conferred upon the District Courts might be decreed to have taken away the concurrent remedy which had before existed in the common law courts, leaving the concurrent power where it stood at common law.<sup>2</sup>

This clause has therefore no application to seizures under the revenue and navigation laws of the United States when made on the admiralty side of the court.<sup>3</sup>

It is the place of seizure and not the place of committing the offence that determines the juris-

<sup>1</sup> *The Sarah*, 8 Wheaton, 391; *La Vengeance*, 3 Dall. 297; *The Sally of Norfolk*, 2 Cranch, 406; *The Betsey and Charlotte*, 4 Cranch, 443; *The Union Ins. Co. v. The U. S.*, 6 Wall. 759.

<sup>2</sup> *The New Jersey Steam Nav. Co. v. The Merchants' Bank*, 6 How. at p. 390.

<sup>3</sup> *The Betsey and Charlotte*, 4 Cranch, 443; *La Vengeance*, 3 Dallas, 297; *The Samuel*, 1 Wh. 9; *Slocum v. Mayberry*, 2 Wh. 1; *Gelston v. Hoyt*, 3 Wh. 246.

diction of the admiralty.<sup>1</sup> Therefore a cargo seized on land, although imported by sea, for a false entry is to be proceeded against on the common law side of the court,<sup>2</sup> but the cargo is within the admiralty jurisdiction until the whole is landed.<sup>3</sup>

Cotton found on land and seized by the naval forces of the United States under the act "to seize and confiscate the property of the rebels," cannot be proceeded against in the admiralty,<sup>4</sup> and a suit cannot be sustained in admiralty against a ship on an information against her cargo, to enforce the payment of duties.<sup>5</sup>

Proceedings by the government to forfeit a French privateer for violation of the act of 1793 forbidding the exportation of arms and ammunition were held to be on the instance side of the court.<sup>6</sup> In the *Santissima Trinidad*<sup>7</sup> the court held that in

<sup>1</sup> *The Betsey and Charlotte*, 4 Cranch, 443; *The Ann*, 9 Cranch, 289; *The Fideliter*, 1 Abbott, 577.

<sup>2</sup> *The Sarah*, 8 Wh. 391.

<sup>3</sup> *U. S. v. Bbls. of Molasses* (250), 11 Int. Rev. Rec. 92; s. c. 3 Am. L. T. 21.

<sup>4</sup> *U. S. v. Winchester*, 99 U. S. 372.

<sup>5</sup> *U. S. v. Chests of Tea* (350), 12 Wheat. 486; *The Waterloo*, 1 Bl. & How. 114.

<sup>6</sup> *La Vengeance*, 3 Dallas, 297.

<sup>7</sup> 7 Wh. 283. Mr. Tazewell, in his argument at p. 315, states: "There are numerous examples to show that there is nothing so sacred in the rights of sovereigns as to prevent the judiciary

the exercise of its jurisdiction to restore the property of neutrals illegally captured, the court would draw no distinction between the public and private armed vessels of the belligerents.

Forfeiture under the provisions of the slave trade act,<sup>1</sup> under the non-intercourse act of 1818,<sup>2</sup> for the fraudulent use of the register by a vessel not entitled thereto,<sup>3</sup> under the passenger act,<sup>4</sup> for penalties for want of a proper manifest,<sup>5</sup> are within the admiralty jurisdiction which extends to enforce all laws relating to navigation on the public waters of the United States without reference to the nature of the commerce in which the vessel is engaged.<sup>6</sup>

Personal actions to recover penalties and admiralty causes against vessels or goods for forfeiture,

from dealing with them both directly and indirectly," and he cites historical cases to the point; the right of a state to sue was upheld in the Supreme Court in the *Wheeling Bridge Case*, by reason of proprietorship of public works, and not in its sovereign capacity. *Penna. v. the Wheeling Bridge Co.*, 13 How. at p. 560.

<sup>1</sup> *The Mary Ann*, 8 Wh. 380.

<sup>2</sup> *The Pitt*, 8 Wh. 371; *The Frances and Eliza*, 8 Wh. 398.

<sup>3</sup> *The Luminary*, 8 Wh. 407.

<sup>4</sup> R. S. §§ 4463-9; *The Sea Bird*, 3 Fed. Rep. 573. See *The Neptune*, 3 Am. Law Reg. 48.

<sup>5</sup> *The Missouri*, 9 Blatch. 433; *The Queen*, 11 Blatch. 416.

<sup>6</sup> *U. S. v. The B. & H. Ferry Co.*, 21 Fed. Rep. 331; the *Daniel Ball*, 10 Wall. 557; the *Bright Star*, Woolw. 266; also the *Gretna Green*, 20 Fed. Rep. 901.

revenue cases, and all species of proceedings *in rem* against things, guilty, hostile or indebted are civil and not criminal actions.<sup>1</sup>

The admiralty courts have jurisdiction of proceedings by their own citizens, and also by neutrals, to obtain restitution of vessel and cargo captured as prize and brought within the jurisdiction of the United States.<sup>2</sup>

These cases are apparently brought on the instance side of the court. The distinction between the instance and prize side of the admiralty cannot be readily ascertained, as in the English admiralty the judges go into commission in prize on the breaking out of hostilities, while the jurisdiction of the American admiralty in prize cases is inherent under the constitution of the United States.<sup>3</sup>

A distinction must be drawn between things guilty and things hostile.<sup>4</sup> The first are triable under the municipal law in the instance side of the court, including forfeitures for piracy;<sup>5</sup> while

<sup>1</sup> Proceedings in Rem by Rufus Waples, § 25.

<sup>2</sup> The Betsey, 3 Dallas, 6; The Santissima Trinidad, 7 Wheaton, 283; The Jolly v. The Neptune, 2 Peters's Adm. 345; The Estrella, 4 Wheaton, 298.

<sup>3</sup> See The Santissima Trinidad, 7 Wheat. 283. In Penhallow v. Doane, 3 Dallas, p. 108, Blair, J., treats the Betsey as a case of prize.

<sup>4</sup> Waples, Proceedings in Rem, § 146.

<sup>5</sup> Ibid.

hostile things must be proceeded against for offences under the laws of nations, on the side of the court sitting as a court of prize.<sup>1</sup> Thus a vessel which was being fitted out and intended to be used as a cruiser against the commerce of the United States during the insurrection was libelled and condemned on the instance side of the court; and the naval officers who aided the seizing officers were denied participation in the proceeds under the law of prize.<sup>2</sup>

§ 30. The admiralty jurisdiction cannot be exercised at the suit of a private individual over national vessels, or a privately armed vessel regularly commissioned by a foreign and friendly power, or by states to which belligerent rights have been accorded, for a tort committed on the high seas. The ground of exemption of public owned vessels is stated by Mr. Justice Story, not to be founded upon any notion that a foreign sovereign has an absolute right in virtue of his sovereignty to an exemption of his property from the local jurisdiction of another sovereign when he comes within his territory, for that would be to give him sovereign power beyond the limits of his own empire; but it stands upon principles of public comity.<sup>3</sup>

<sup>1</sup> Waples, *Proceedings in Rem*, § 221.

<sup>2</sup> *Proceeds of The Chapman*, 4 Sawyer, 501.

<sup>3</sup> *The Santissima Trinidad*, 7 Wh. at p. 352; *L'Invincible*, 1



In torts committed by national vessels, the court will assert the personal liability of the person by whose fault the injury was committed, but not against the ship of the government in public employment.

The exemption of the government or of a sovereign from process extends to all vessels and property in the public service of the nation, and is not confined to vessels in the military service.<sup>1</sup> On the same principle a tugboat owned by a municipality and only employed for public purposes cannot be arrested by process *in rem* to respond to a claim for damages; the same reason which prevents a seizure for debt forbids the seizure to enforce a lien in admiralty.<sup>2</sup> It extends to lightships which cannot be seized after they have become the property of the government for a lien given by the state law in their construction, but the burden of proof is on those claiming exemption;<sup>3</sup> and to transports belonging to private indi-

Wh. 238; *The Exchange*, 7 Cranch, 116; ("The Cassius;") *U. S. v. Peters*, 3 Dallas, 121; *contra*, *The Constitution*, L. R. 4 P. D. 39; *The Parlement Belge*, L. R. 5 P. D. 197; *The Charkieh*, L. R. 4 A. & E. 59.

<sup>1</sup> *Briggs v. The Lightboat*, 11 Allen, 157.

<sup>2</sup> *The Fidelity*, 16 Blatch. 569; *The Seneca*, 8 Ben. 509; *The Protector*, 20 Fed. Rep. 207.

<sup>3</sup> *Ibid.*; *Long v. The Tampico*, 16 Fed. Rep. 491; *contra* *The Revenue Cutter No. 1*, 21 Law Rep. 281.

viduals when in the public service of a nation;<sup>1</sup> but in the case of private vessels in the public service of a nation, the right to arrest is only suspended while the vessel is in such service; so that where a collision occurred while a vessel was engaged as a transport in the French military service, an action *in rem* was sustained against the vessel after the charter-party expired and the public service ended.<sup>2</sup> But the exemption does not extend to all the property of a sovereign; when a state becomes a trader or enters into commerce, the property of the state may become subject to the adjudication of the tribunals.<sup>3</sup>

In the case of *U. S. v. Wilder*,<sup>4</sup> Judge Story held that general average contribution was payable on that part of the cargo which belonged to the government of the United States, and the court compelled contribution out of the portion of the cargo claimed by the United States. He considered that the very circumstance that the United

<sup>1</sup> *The Athol*, 1 Wm. Rob. 374; *The Thomas A. Scott*, 10 Law Times (N. S.), 726.

<sup>2</sup> *The Ticonderoga*, Swabey, 215.

<sup>3</sup> *Penna. v. The Wheeling Bridge Co.*, 13 How. 519; see, also, *Taylor v. Best*, 14 C. B. 487; *The Magdalena St. Nav. Co. v. Martin*, 2 E. & E. (105 E. C. L. R.) 94; *United States v. Lee*, 106 U. S. 196.

<sup>4</sup> 3 Sumner, 308.

States was not subject to a suit for general average, furnished the strongest grounds why the right to retain the property and proceed *in rem* against it should exist to enforce the maritime lien against government property. But the proceedings in which salvage can be awarded, or other proceedings *in rem* taken against the property of the United States, are such as do not require process to issue against the United States, or its property to be taken out of the possession of the government or of its officers; so that where property of the government was delivered into the possession of a carrier, and before it was delivered by the master, was attached in a cause of salvage against the vessel and cargo, and the government appeared as a claimant, salvage was awarded against the property of the government.<sup>1</sup>

So, where a prize, after capture and before condemnation, while in charge of the prize crew, collided with another vessel and was in fault, and the government brought the prize into court for condemnation and placed the *res* in possession of the court for adjudication as prize, it was held that the lien for damages by the collision could be adjudicated and enforced against the vessel, although the vessel had, by the capture subsequently per-

<sup>1</sup> The Davis, 10 Wall. 15.

fectured by condemnation, become the property of the United States.<sup>1</sup>

But the admiralty will not proceed against the vessel of a foreign government in a cause of salvage, where it is necessary to arrest the vessel in the possession of the officers of the government,<sup>2</sup> although the vessel had cargo on board entrusted to its care by private owners, as in the case of the *Constitution*, a vessel belonging to the United States, which was solely engaged transporting goods of private persons at the public expense.<sup>3</sup>

The English Admiralty Division in *The Charkieh*<sup>4</sup> held that a vessel of the Khedive of Egypt, officered by officers of the Ottoman navy and carrying the Ottoman naval pennant, but engaged in commerce, was not entitled to the privilege of a national vessel. The principal ground for the ruling, in Sir R. Phillimore's opinion, is that the Khedive of Egypt was not such "a sovereign prince, according to the criteria of sovereignty required by the reason of the thing," as entitled his vessel to the immunity from arrest accorded to the vessels of other sovereigns.<sup>5</sup> But in *The*

<sup>1</sup> *The Siren*, 7 Wall. 152.

<sup>2</sup> *The Prins Frederik*, 2 Dodson, 451.

<sup>3</sup> *The Constitution*, L. R. 4 P. D. 39.    <sup>4</sup> L. R. 4 A. & E. 59.

<sup>5</sup> See reference to the *Charkieh* in *The Constitution* L. R. 4 P. D. at p. 45.

*Parlement Belge*<sup>1</sup> the same judge allowed the arrest of a Belgian vessel—the property of the king of the Belgians and a public vessel of the sovereign and of the state, running as a mail packet between Ostend and Dover, carrying the royal pennon, officered by officers of the royal Belgian navy and transporting letters, merchandise, passengers and their luggage for hire—on the ground that such vessel was not in the public service and that a public vessel, like an ambassador, may lose its privilege by engaging in commerce. This ruling was, however, reversed on appeal.<sup>2</sup> Brett, L. J., distinguishing this case from the grounds on which *The Charkieh* was decided, held that the vessel was public property and that the mere fact of the ship being used subserviently and partially for trading purposes, did not take away the immunity of the vessel from arrest under the public law. The reasons given for allowing a suit to be brought against a trading vessel of the Khedive of Egypt and for refusing to allow process against a trading vessel of the king of the Belgians,<sup>3</sup> are unsatisfactory. The opinion in *The Charkieh* does not recognize the vigorous principle of law that a sovereign who becomes a trader sub-

<sup>1</sup> L. R. 4 P. D. 129.

<sup>2</sup> Ibid. L. R. 5 P. D. 197.

<sup>3</sup> *The Charkieh*, L. R. 4 A. & E. 59. *The Parlement Belge*, L. R. 5 P. D. 197.

jects himself to the laws of trade, and, in the case of *The Parlement Belge*, denies its application to a passenger vessel owned by the state, whose occupation was little more than a ferriage between Dover and Ostend in connection with the railways. The American cases assert the rule of sovereign immunity from suit in a manner which prevents its being applied to destroy the ordinary obligations growing out of commerce and navigation, but which will not allow its international comity with friendly powers to be drawn into litigation in its courts.

The right to proceed against the property or ship of a sovereign was asserted to exist by the Supreme Court of the United States, in the *Santisima Trinidad*,<sup>1</sup> and by Lord Stowell in the *Prins Frederik*.<sup>2</sup> It was refused in both cases for reasons of comity which will not apply to the trading vessels of a government and its application, to this class of vessels, may lead to great abuse, and the same reason would apply as well to claims for damages to cargo and to passengers as to those growing out of collision.

§ 31. Every violent dispossession of property on the ocean is *prima facie* a maritime tort, and as such it falls within the admiralty jurisdiction.<sup>3</sup> While the right of adjudication in all questions of

<sup>1</sup> 7 Wh. 288.

<sup>2</sup> 2 Dodson, 451.

<sup>3</sup> *L'Invincible*, 1 Wheat. at p. 257; *Talbot v. Janson*, 8 Dallas, 183.

prize belongs to the courts of the captor's country; it is an exception to the general rule, that where the captured vessel is brought, or voluntarily comes *infra præsidia* of a neutral power, that power has the right to inquire whether its own neutrality has been invaded by the cruiser which made the capture, and if such violation has been committed, is in duty bound to restore to the original owner, property captured by cruisers illegally equipped at its ports.<sup>1</sup>

The mere act of seizure as prize does not oust the admiralty court of its jurisdiction as in addition to the cases in which neutral courts may divest a possession obtained by capture on the ground of an invasion of neutrality; there is no case in which the court of a neutral might not, to prevent piracy, claim the right of inquiry whether the capturing vessel was not, in fact, the commissioned cruiser of a belligerent power.<sup>2</sup>

The exemption of the public vessel itself therefore does not extend to prize property which she brings into the ports of the United States, and the landing of such goods even by express permission of the government does not, if illegally captured, exempt them from the ordinary operation of the laws.<sup>3</sup>

<sup>1</sup> *The Estrella*, 4 Wheat. 298.

<sup>2</sup> *Talbot v. Janson*, 3 Dallas, 133; *L'Invincible*, 1 Wheat. 238.

<sup>3</sup> *The Santissima Trinidad*, 7 Wh. 283; *The Betsey*, 3 Dallas, 6;

§ 32. It has been said that the vessel proceeded against must be one capable of being propelled by steam or sails as a motive power of its own. A canal boat was at one time held not to be such a vessel as would become the subject of a libel for affreightment;<sup>1</sup> nor coal barges intended only for a single voyage, in collision on the Monongahela river;<sup>2</sup> nor small vessels engaged in ordinary traffic along the shore;<sup>3</sup> nor did the jurisdiction extend to services in navigating a raft of logs.<sup>4</sup> But later cases seem to extend the scope of admiralty jurisdiction to all classes of vessels used in commerce or navigation without regard to the necessity for such liens arising, in order to enable them to conduct their voyage,<sup>5</sup> and the lien has since been enforced for supplies and services to

see, also, *The Divina Pastora*, 4 Wh. 52, note a, p. 65; *The Estrella*, 4 Wheat. 298.

<sup>1</sup> *The Ann Arbor*, 4 Blatch. 205; *Wallis v. Chesney*, 4 Am. L. Reg. 307; *McCormick v. Ives*, 1 Abb. Adm. 418.

<sup>2</sup> *Jones v. The Coal Barges*, 3 Wall. Jr. 53.

<sup>3</sup> *Thackary v. The Farmer of Salem*, Gilp. 524.

<sup>4</sup> *Gastrel v. A Cypress Raft*, 2 Woods, 213; *Raft of Cypress Logs*, Flippin, 543.

<sup>5</sup> *Ex parte Easton*, 95 U. S. at 74; *Endner v. Greco*, 3 Fed. Rep. 411; *The General Cass*, 1 Brown, 334; *Maltby v. The St. Derrick Boat*, 3 Hughes, 477; *The Elmira Shepherd*, 8 Blatch. 341; *Kearney v. A Pile Driver*, 3 Fed. Rep. 246; *The Hezekiah Baldwin*, 8 Ben. 556; *The Pioneer*, 21 Fed. Rep. 426.



dredge sand scows.<sup>1</sup> The courts have refused to enforce a maritime lien for salvage against a dismantled steamboat used as a hotel while being towed, because it was not an instrument of commerce or navigation;<sup>2</sup> and the same ruling was held as to a floating drydock,<sup>3</sup> while a dismantled steamboat used as a wharfboat was considered the subject of jurisdiction.<sup>4</sup>

§ 33. The jurisdiction of the admiralty is not affected by the citizenship of the parties or their residence under the act of 1789.<sup>5</sup>

The courts of every civilized nation are called upon to determine suits to which foreigners are parties, and the courts of admiralty more frequently than others, by reason of their dealing with foreign commercial vessels over which their jurisdiction extends as completely as over vessels of their own country,<sup>6</sup> both in controversies between citizens of the United States and foreigners, and where both parties are foreigners.

In controversies exclusively between foreigners,

<sup>1</sup> *The Alabama*, 19 Fed. Rep. 544.

<sup>2</sup> *The Hendrick Hudson*, 3 Ben. 419.

<sup>3</sup> *The Salvor Wrecking Co. v. The Section Dock Co.*, 3 Cent. Law J. 640; *Cope v. The Vallette Dry Dock*, 10 Fed. Rep. 142.

<sup>4</sup> *The Old Natchez*, 9 Fed. Rep. 476.

<sup>5</sup> *Atkins v. The Disintegrating Co.*, 18 Wall. 272.

<sup>6</sup> *The Howard*, 18 Howard, 231; *The Maggie Hammond*, 9 Wall. 435; *The Blaireau*, 2 Cranch, 240.

the jurisdiction is discretionary, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.<sup>1</sup>

But it appears to be against the rules of comity for a nation to refuse to the subjects of a friendly government a right to seek redress against a vessel coming within the jurisdiction of the American courts, peculiarly so in the admiralty because the result would be, in many cases of tort, to produce a failure of justice, from the loss of evidence of seamen and the perishable and transitory character of the property against which the proceedings are taken, and which in most maritime cases is the only source of redress.

In a very early case of salvage by English subjects against a French ship<sup>2</sup> Chief Justice Marshall said that "a doubt had been suggested respecting the jurisdiction of the court, and upon a reference to authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea that, upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. In weighing the con-

<sup>1</sup> *The Maggie Hammond*, 9 Wall. 435 ; 2 *Parsons on Maritime Law*, 543.

<sup>2</sup> *The Blaireau*, 2 Cranch, 240.

siderations drawn from public convenience those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court that whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it."

Since the decision of that case the right to adjudicate has been upheld, although objections have been raised by the party proceeded against; and as the lien against the ship can only be enforced in the jurisdiction where the vessel is found, it cannot be prosecuted at all if the maritime courts of this and other countries should refuse to entertain suits between foreigners, and there would be every motive for trading vessels to abstain from visiting the jurisdiction of the courts in which they are liable to arrest.<sup>1</sup>

The right of the English admiralty to entertain suits between foreigners for causes arising on the high seas and not in English waters has been sustained. In *The Johann Friederich*,<sup>2</sup> Dr. Lushington overruled a protest against the jurisdiction of the court, made upon the ground that both vessels were the property of foreign owners and the col-

<sup>1</sup> *The Naval Reserve*, 5 Fed. Rep. 209; *Guibert v. The George Bell*, 3 Fed. Rep. 581; *The Russia*, 3 Benedict, 471; *The Jupiter*, 1 Ben. 536. See remarks of Lushington, J., in *The Johann Friederich*, 1 Wm. Rob. 36.

<sup>2</sup> 1 Wm. Rob. 36.

lision occurred while the two vessels were in the prosecution of their respective voyages on the high seas.

All cases of collision and of salvage are said by that judge to be questions *communis juris*, which is the distinction to be observed in taking jurisdiction between foreigners. He sustained the jurisdiction to try this case because, first, all causes of collision are *communis juris*; second, the vessel at the time of her arrest was within the admiralty jurisdiction; third, the collision took place upon the high seas close upon the English coast. The fact that the collision took place close to the English coast does not appear to be a necessary consideration to induce a court to assert jurisdiction, although this fact is also noticed by the Supreme Court of the United States in *The China*.<sup>1</sup> And in a later case the English admiralty sustained its jurisdiction in a cause of collision in the Bosphorus between a Norwegian and an Austrian vessel<sup>2</sup> and also for a collision in the river Scheldt by a Norwegian bark against a British vessel.<sup>3</sup>

It will be found that the admiralty courts of the United States and of England never refuse to take

<sup>1</sup> 7 Wall, 53; *Twee Gebroeders*, 3 C. Robinson, 386. See *Harris v. The Franconia*, L. R. 2 C. P. D. 173.

<sup>2</sup> *The Mali Ivo*, L. R. 2 A. & E. 356. See, also, *The Griefswald*, Swabey, 430; *The Courier*, Lush. 541.

<sup>3</sup> *The Halley*, L. R. 2 A. & E. 3.

jurisdiction between foreigners, even of the same nationality, which they undoubtedly have, unless the interests of justice will be promoted by referring the suit to the tribunals of their own country.<sup>1</sup>

In the *Griefswald*<sup>2</sup> Dr. Lushington says: "In cases of collision it has been the practice of this country and, as far as I know, of the European states and of the United States of America, to allow a party alleging grievance by a collision to proceed *in rem* against the ship wherever found, and this practice, it is manifest, is most conducive to justice, because in very many cases a remedy *in personam* would be impracticable," and Blatchford, J., in *The Russia*,<sup>3</sup> says: "I am not aware that jurisdiction, in a case of collision, has ever been declined by any court of admiralty, either in the United States or in Great Britain, because the two colliding vessels were the property of foreign subjects."

§ 34. An exception exists in the case of seamen's wages and disputes between the seamen and the masters of foreign ships. Questions involving seamen's wages are not *communis juris*.<sup>4</sup> Although a ship is treated as a part of the territorial sove-

<sup>1</sup> *The Maggie Hammond*, 9 Wall. 435; *The Naval Reserve*, 5 Fed. Rep. 209; *The Russia*, 3 Benedict, 471; *The Jupiter*, 1 Benedict, 536.

<sup>2</sup> 1 Swabey, 430.

<sup>3</sup> 3 Benedict, 471.

<sup>4</sup> *The Johann Friederich*, 1 Wm. Rob. 36.

reignty of the flag to which she belongs, and the relations of the crew to the vessel are governed only by the laws of her country,<sup>1</sup> yet the admiralty can take jurisdiction of suits for wages by seamen against foreign vessels when the voyage is ended<sup>2</sup> or the seaman is discharged in an American port, and will enforce the lien according to the law of the nationality of the vessel, as in the case of the master's lien for wages under the English statute, although by the maritime law of the United States no such lien is given to the master.<sup>3</sup> Such a lien will not be permitted to interfere with or defeat liens given by the law of the forum, such as that for supplies to a vessel in a foreign port,<sup>4</sup> but the court is reluctant to take jurisdiction without the request of the consul of the nation to which the vessel belongs.<sup>5</sup> It is the nationality of the vessel and not of the crew which governs the exercise of the discre-

<sup>1</sup> *Regina v. Carr*, 22 Am. Law Reg. (N. S.) 299.

<sup>2</sup> *The Napoleon*, Olcott, 208; *Davis v. Leslie*, 1 Abb. Adm. 128; *Bucker v. Klorkgeter*, 1 Abb. Adm. 402; *Gonzales v. Minor*, 2 Wall. Jr. 348; *The Amalia*, 3 Fed. Rep. 652. Unseaworthiness releases the crew from their engagement, and entitles them to full wages. *The Heroe*, 21 Fed. Rep. 525.

<sup>3</sup> *The Havana*, 1 Sprague, 402; *The Enterprise*, 1 Low. 455; *Covert v. The British Brig Wexford*, 3 Fed. Rep. 577.

<sup>4</sup> *The Graf Klot Trautvetter*, 8 Fed. Rep. (N. S.) 833.

<sup>5</sup> *The Carolina*, 14 Fed. Rep. 424; *The Montapedia*, *ibid.* 427; *Gonzales v. Minor*, *ante*.

tion of the court in taking cognizance of the cause,<sup>1</sup> and all the crew are treated as of the same nationality as the vessel.

It is provided by treaty stipulations between some foreign countries and the United States that all such questions shall be determined by the consular authorities of the country to which the vessel belongs, without interference by courts of this country.<sup>2</sup> In cases where it is so provided by treaty the admiralty has no jurisdiction.<sup>3</sup> But in the absence of a consular agent capable of giving redress the jurisdiction is not excluded by such treaty stipulations from the necessities of justice.<sup>4</sup> But independently of such treaties admiralty courts are reluctant to interfere unless in the absence of a consular agent or at his request,<sup>5</sup> although his approval is not necessary.<sup>6</sup> But where the voyage of a foreign vessel is broken up and the seamen are discharged in an American port the District Court

<sup>1</sup> *The Amalia*, 3 Fed. Rep. 652; *Nina*, L. R. 2 P. C. 38. *The Montapedia*, 14 Fed. Rep. 427.

<sup>2</sup> See Treaty with Prussia, 8 U. S. Stat. at Large, 378, 382; Treaty with Bremen, 10 U. S. Stat. at Large, 961.

<sup>3</sup> *The Elwine Kreplin*, 9 Blatch. 438; *The Theodore Korner*, 3 Am. L. Reg. 47.

<sup>4</sup> *The Amalia*, 3 Fed. Rep. 652.

<sup>5</sup> *Hayes v. The J. J. Wickwire*, 7 Phila. 594; *The Mina*, 6 Phila. 482.

<sup>6</sup> *Bucker v. Klorkgeter*, 1 Abb. Adm. 402.

will entertain jurisdiction of a libel *in rem* for their wages<sup>1</sup> even against the protest of the consul of the nation. And when the interests of justice require it it will entertain a suit by a foreign seaman for wages, notwithstanding a stipulation in the shipping articles that he will sue only in the courts of his own country,<sup>2</sup> and where the seamen were citizens of the United States and their term of service was ended the admiralty sustained its jurisdiction against a Bremen vessel, notwithstanding the treaty with Bremen.<sup>3</sup> It entertains jurisdiction for personal damages brought by American seamen on board a foreign vessel,<sup>4</sup> and of a suit of a like nature by a subject of another nationality against a foreign vessel on board of which he was serving, against the protest of the consul of the nation to which the vessel belonged.

§ 35. The rules by which courts enforce the law of foreign jurisdictions within their limits are as binding as the laws of their own whenever proper circumstances give occasion for applying them. They differ only from the rules of action which are the laws of that nation in which the

<sup>1</sup> *Orr v. The Acsah*, Dist. Court of Phila. Dec. 1849, Kane, J. See, also, *The Becherdass Ambaidass*, 1 Low. 569.

<sup>2</sup> *Bucker v. Klorkgeter*, 1 Abb. Adm. 402.

<sup>3</sup> *Leavit v. Shakespeare*, 3 Chic. Leg. News, 156.

<sup>4</sup> *Patch v. Marshall*, 1 Curtis, 452.



court sits, in respect that they are not "commanded by the supreme power in the state" under which the court exercises its authority. They are nevertheless of moral, if not of full legal, obligation, and as such, become part of the jurisprudence of the country of the court.<sup>1</sup> In the admiralty, especially where the exercise of the jurisdiction over foreigners is discretionary, the occasion for the exercise of this comity arises whenever the subject of arrest is a ship of a foreign nation. It applies to such cases as well the law of the forum as of the place of performance and, in a modified sense, that of the *locus rei sitae* to the ship, which, in some respects, even when within the ports of another state, is considered as a part of the land of the nation whose flag it carries, which has given rise to the expression in modern jurisprudence of the law of the flag,<sup>2</sup> and becomes subject to the local law only

<sup>1</sup> The law of comity may be considered the ground on which a foreigner is permitted to sue (*The Carolina*, 14 Fed. Rep. 424); but the exercise of jurisdiction under which a foreign ship is arrested by the courts of this country, and adjudicated *in invitum*, cannot be said to be exercised for reasons of comity although the jurisdiction is discretionary (*The Blaireau*, 2 Cranch, 240); it is in the exercise of a legal discretion that it is allowed or refused. See Article on Suits between Aliens, 7 Am. L. Rev. p. 417.

<sup>2</sup> An instance in which this principle was applied and carried, perhaps to an extreme extent, is found in the case of *Regina v. Carr*, *Crown Cases Reserved*; 22 Am. Law. Reg. (N. S.) 299,

where the enforcement of the foreign law would override the law of the port.<sup>1</sup>

where the English court exercised criminal jurisdiction in a case of theft committed on board an English ship in the harbor of Rotterdam.

In the *Queen v. Keyn*, L. R. 2 Exch. Div. 63, where the attempt was made to exercise criminal jurisdiction by the English court for a crime under the laws of England, committed by the master of a North German vessel within three miles of the coast of England, the jurisdiction was denied, mainly on the ground that the three-mile zone of jurisdiction existed only for the protection of the coast and of the inhabitants thereof, and did not apply to vessels in transit and not bound to a port of the nation, while the converse is found in *The China*, 7 Wall. 53, in which the court refused to apply the law of the vessel's nationality and applied that of the port, to which the vessel was bound, to a collision on the high seas, where laws of the forum created a liability different from that of the vessel's nationality, because the vessel had voluntarily subjected herself to the laws of the port to which she was bound. The same principle is applied in *The Annapolis*, Lush. 295. The cases of *The Clymene*, 9 Fed. Rep. 164, affirmed in 12 Fed. Rep. 346, followed in the same circuit by *The Alzena*, 13 W. N. C. (Pa.) 63, and *The Charles A. Sparks*, 16 Fed. Rep. 480, which enforced and imposed the laws of the littoral government upon a vessel passing along waters within the territorial jurisdiction of a state and not bound to a port of that state, are not in accordance with this rule. These cases imposed on a vessel in transit the same laws which would have applied, if the vessel had voluntarily subjected itself to the laws of the state of Delaware by coming to one of its ports. The District Court of Delaware decided, also, that the state of Dela-

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<sup>1</sup> *Pope v. Nickerson*, 3 Story, 465; Wharton's *Conflict of Laws*, § 356.

§ 36. But a question of great difficulty arises as to the application of the foreign or of the municipal

law had authority over the subject of pilotage over vessels navigating waters within her limits. *The William Law*, 14 Fed. Rep. 792. In this case the Delaware Breakwater was considered as a part of the state. The jurisdiction of the littoral states lying in the public navigable waters of the United States extends, for certain police purposes, to the middle of the stream, on the same principle that the authority of a nation over the sea extends, "for the protection of the shore and the inhabitants thereof," beyond low-water mark. But the right of navigation is paramount to the local state laws, and although the federal law permits state legislation in pilotage as a law of the port (*Cooley v. The Board of Wardens*, 12 How. 299), the considerations which permit the authorities of the port to foster the trade of the port by local laws of pilotage are inconsistent with permitting the authorities of another state to interfere with it. In a subsequent case the rule was further extended so as to compel a vessel bound to Philadelphia to pay compulsory pilotage under the laws of the state of Delaware, under circumstances which rendered the vessel free from pilotage under the laws of the port to which she was bound. *The Charles A. Sparks*, 16 Fed. Rep. 480. The Revised Statutes, § 4236, did not apply to the last case, as they do not refer to compulsory pilotage, and the decision in *The Clymene* was not placed on the construction of that statute, but on the public law. Pilotage laws are shown to be regulations of the port in the case of *The Chase*, 14 Fed. Rep. 854, where the laws of Florida, giving to the authorities of each port in that state the right to regulate its own pilotage system, were sustained; which is in entire accordance with the decision of the Supreme Court in *Cooley v. The Board of Wardens*, 12 How. 299, and the views of Field, J., in *County of Mobile v. Kimball*, 102 U. S. 691, as it is not to be supposed that the authorities of the port will drive

law of the forum in proceedings against vessels of another nationality or between vessels of different nationalities, whether the law of the forum or the law of the nationality of the vessel, called the law of the flag, is to apply.

It has received a different consideration in the courts of the United States and of England, although the diversity between them has been modified by parliamentary legislation.

The principle which governs all questions of jurisdiction and remedy is stated by Judge Story:<sup>1</sup> "In respect to the merits and rights involved in actions, the law of the place where they originated is to govern, but all forms of remedy and judicial proceedings are to be according to the law of the place where the action is situated, without any regard to the domicile of the parties, the origin of the right, or the country of the act."

away commerce by imposing unnecessary regulations on vessels seeking it, and is an answer to those who seek to regulate the subject of pilotage by congressional legislation. These views are sustained in Wharton's Commentaries on Am. Law, § 424, in the following passage: "But beyond its territorial waters the jurisdiction of a state in this relation cannot extend, nor should it be permitted to exercise jurisdiction even over such territorial waters when they are the thoroughfares for interstate commerce. Pilotage is distinctively a matter of port concern, and local laws, as to pilotage, should be limited to vessels entering the ports of the state imposing such laws."

<sup>1</sup> Story's Conflict of Laws, § 588.

Another rule is equally important to be observed, that whoever seeks the jurisdiction of the court of a country submits to an adjudication by its laws, and a party seeking redress in the admiralty courts of this country asks the protection of the maritime law as administered in its courts, whether adopted from the general maritime law or by statute.<sup>1</sup>

The same view was taken by the judicial committee of the Privy Council.<sup>2</sup> Lord Chelmsford says: "What breach of international law or interference with the natural rights of foreigners is produced by the legislature saying, that all suitors having recourse to our courts to obtain damages for an injury from a person not himself actually in fault, but being responsible for the acts of his servant, shall recover only to the value of the thing by which the loss or damage was occasioned, estimated in a particular way."

This was said in a cause in which the British owner sought to limit his liability, in accordance with the English statute, in a cause of collision with a foreign vessel, instituted in the English courts by a foreigner.

The principle was asserted in *Cammell v. Sewell*,<sup>3</sup> where, in proceedings *in rem* in the courts

<sup>1</sup> Per Bradley, J., in *The Scotland*, 105 U. S. 24.

<sup>2</sup> *The Amalia*, Brown & Lush. 151.

<sup>3</sup> 3 H. & N. 617.

of Norway, the English owners of cargo intervened to prevent a judicial sale in proceedings instituted by the master, and the courts of Norway had confirmed a sale under circumstances not justified by the English law. The court held that, as the owners thought fit to seek their remedy in what must be taken to be a foreign court of competent jurisdiction, they were conclusively bound by it. But as the admiralty courts can and almost always do entertain jurisdiction against foreign vessels which, by arrest, are brought into adjudication in the court of this country *in invitum*,<sup>1</sup> the difficulty is one not easy of solution and the decisions of the courts of the United States and of England are not in harmony; although late acts of parliament have relieved the English law of its most invidious features when dealing with the rights of foreigners, under the judicial construction of their sailing rules and the laws limiting the liability of ship-owners, referred to in the opinion in *The Scotland*.<sup>2</sup>

§ 37. The attempt of jurists to discover some universal maritime law binding upon all nations as a code of international law is now abandoned.

The Supreme Court of the United States declares "that the maritime law is only so far operative as law in any country as it is adopted by the

<sup>1</sup> See *post*, Collision.

<sup>2</sup> 105 U. S. 24.

laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such, or, like the case of the civil law which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient,"<sup>1</sup> and the same court further says: "It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries are not one and the same in every particular; but, that whilst there is a general correspondence between them, arising from the fact that each adopts the essential principles and the great mass of the general maritime law as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens

<sup>1</sup> Per Bradley, J., in *The Lottawana*, 21 Wall. at p. 572.

that from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems the great mass of maritime law, which is thus received by these nations in common, comes to be the common maritime law of the world.”<sup>1</sup>

The English court of appeals in *The Gaetano & Maria* takes the same view.<sup>2</sup> “Any general, much more any universal, law binding on all nations using the pathway of the sea, . . . is easier longed for than found.”<sup>3</sup>

A vessel at sea and even in port is regarded as part of the territory of the sovereign to which she

<sup>1</sup> *The Lottawana*, 21 Wall. at page 573. See, also, *The St. Lawrence*, 1 Black, 526-7. See opinion of Mr. Justice Bradley in *The Scotland*, 105 U. S. 24.

<sup>2</sup> L. R. 7 P. D. 137-142. Speaking of the maritime law as administered in the court of admiralty, Brett, L. J., says: “Every court of admiralty is a court of the country in which it sits and to which it belongs. The law which is administered in the admiralty court of England is the English maritime law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty, either by act of parliament or by repeated decisions and traditions and principles, has adopted as the English maritime law.” *Contra*, Sir Robert Phillimore in *The Patria*, L. R. 3 A. & E. at p. 461.

<sup>3</sup> Willes, J., in *Lloyd v. Guibert*, L. R. 1 Q. B. 115.

The law applicable to collision on the high seas is treated under the head of Collision.



belongs,<sup>1</sup> and in the Trent case the French government pointed out with clearness that the English claim was an assertion that a ship is part of the territory of the sovereign whose flag it carries; which had always been insisted upon as a principle of maritime law by the American government.<sup>2</sup>

§ 38. In proceedings against a foreign vessel, on a contract, whether made in its own or a foreign country, the municipal law of the nation to which the vessel belongs will be applied to determine the

<sup>1</sup> Wharton's Conflict of Laws, § 356; *Regina v. Carr*, Crown Cases Reserved; 22 Am. Law Reg. (N. S.) 299.

<sup>2</sup> It is, in such cases, a "misapprehension of the principle which makes a vessel a portion of the territory of the nation whose flag it bears, and violation of that immunity which protects a foreign sovereign by consequence from the exercise of his jurisdiction. It is certainly unnecessary to recall to mind with what energy, under every circumstance, the government of the United States has maintained this immunity and the right of asylum, which is the consequence of it." Thouvenel to Mercier.—Correspondence relating to the case of *Mason and Slidell*, p. 13. The American government, without admitting the illegality of the seizure, under the circumstances surrendered the prisoners on the ground of the failure of the captors to send the vessel in for adjudication. The English assertion of the immunity of enemies on board the *Trent* from arrest was, in fact, an admission of a principle for which the American government had always contended. See, also, letter from Buchanan to Jackson.—*Life of Buchanan*, by Curtis, vol. i. p. 164.

remedy<sup>1</sup> and its efficacy.<sup>2</sup> A lien or privilege, valid according to the law of the flag of the vessel, will be enforced, although no such lien is given by the law of the forum as in the case of the lien of the master for wages.<sup>3</sup>

The contracts of the master in reference to the employment of his vessel made in a foreign port, will be governed by the law of the vessel's nationality, and the flag is notice to all parties dealing with the master, of the liability and obligations of the ship, growing out of the transactions of the master.<sup>4</sup>

A bottomry bond was given by the master of an Italian vessel at Fayal, covering vessel and cargo—the latter was in part the property of English subjects. Such a bond was valid according to the law of Italy, without communication with the owners of the cargo. The validity of the bottomry bond so executed was sustained against the cargo in the English courts, although by the maritime law of England, as administered in the English admiralty, the bond was not obligatory on

<sup>1</sup> *The Maggie Hammond*, 9 Wall. 435.

<sup>2</sup> *Lloyd v. Guibert*, L. R. 1 Q. B. 115.

<sup>3</sup> *The Selah*, 4 Sawyer, 40; *The Orleans v. Phœbus*, 11 Peters, 175.

<sup>4</sup> *Lloyd v. Guibert*, L. R. 1 Q. B. 115. See, also, *The Patria*, L. R. 3 A. & E. 436.

the owners of the cargo, for want of communication by the master with them.<sup>1</sup>

All contracts of affreightment for carriage of goods on the high seas made in a foreign port, would seem to be governed by the municipal law of the nation to which the vessel belongs.<sup>2</sup>

In *Lloyd v. Guibert*, a British subject chartered a French ship at a Danish West India port, to proceed to Hayti and load for a port in France or England, at the charterer's option. The question was as to the personal liability of the French owners on a bottomry bond given at Fayal, covering ship and cargo. By the English law, the vessel owners were personally liable for a deficiency of the vessel and freight to pay the bond, which was paid by the shippers of the cargo, from which liability the owners were discharged under the law of France by a surrender of the vessel and freight; and it was alleged and not denied, that the Danish, Portuguese, and Haytien law agreed with the law of England.

The solution of this question was arrived at by holding that the charterers must be presumed to have contracted in reference to the French law. It was pointed out, that "although bills of lading

<sup>1</sup> *The Gaetano and Maria*, L. R. 7 P. D. 137.

<sup>2</sup> *Lloyd v. Guibert*, L. R. 1 Q. B. at 127; *The Maggie Hammond*, 9 Wall. 435; *Pope v. Nickerson*, 3 Story, 465.

are ordinarily given at the port of loading, charter-parties are often made elsewhere; and it seems strange and unlikely to have been within the contemplation of the parties that their rights or liabilities in respect of the identical voyage should vary first according as the vessel was taken up at the port of loading or not; and, secondly, if she were taken up elsewhere, according to the law of the place where the charter-party was made or even ratified." Mr. MacLachlan adopts the same view, that "the flag at the masthead is notice to all the world of the extent of such (the master's) power to bind the owners or freighters by his acts."<sup>1</sup>

The Supreme Court of the United States, without so deciding, examined into the English law to ascertain the right of the master of a British ship to pledge the cargo in a foreign port.<sup>2</sup> And in accordance with this principle, the word enemies in the exceptions of the bill of lading, is held to mean enemies of the carrier's nation.<sup>3</sup>

In the case of the "Bahia,"<sup>4</sup> Dr. Lushington held that the duty of the master of a French ship to transship in case of distress, was to be governed by the law of France; the bill of lading was signed at New York, for a voyage to France, and the

<sup>1</sup> Law of Merchant Shipping (2 ed.) 161.

<sup>2</sup> The Julia Blake, 107 U. S. 418.

<sup>3</sup> Russell v. Niemann, 17 C. B. (N. S.) 163.

<sup>4</sup> Br. & Lush. 292.

vessel put into an English port in distress; but he stated that he would have arrived at the same result if the law of New York applied to the contract.<sup>1</sup>

In *Pope v. Nickerson*,<sup>2</sup> the question arose as to the liability of the owners for the loss of the cargo

<sup>1</sup> A case decided in 1888 (D. C., S. D. C. of New York; *The Montana*, 17 Fed. Rep. 377, affirmed in the C. C.; see, also, *The Regulus*, 18 Fed. Rep. 380) holds that the personal liability of the owners of a British vessel, under a bill of lading, for the carriage of goods from New York to Liverpool, which contained a clause of exemption from liability for negligence of the servants of the owners, was to be governed by the American law, or the law of the forum, which refuses to exempt the carrier from liability for such negligence.

The vessel was wrecked on the coast of England, and the shippers sought to enforce the personal liability of owners in New York, and the exemption claimed under the British law was denied to the English carriers. On the other hand, the same court held that the English law governed in a shipment from Scotland to New York in a British vessel, *The Titania*, 19 Fed. Rep. 101. Sir R. Phillimore also seems to regard the *lex loci* as affecting the interpretation of the contract of the bill of lading in *The Duero*, L. R., 2 A. & E. 393. These decisions are not consistent with the English, nor, probably, with the American rule in *Pope v. Nickerson*, 3 Story, 465. The rules laid down in *The Scotland*, 105 U. S. 24, apply the law of the forum only to collisions on the high seas, between foreign vessels of different nationalities, not governed by the same law—in the absence of any general maritime law binding upon both at the place where the collision happened—and have no reference to liability growing out of contracts.

<sup>2</sup> 3 Story, 465.

shipped at Malaga and to be delivered at Philadelphia—the vessel being owned in Massachusetts. By the law of Massachusetts, the liability of the owners was limited to the value of the ship and freight, and the same law applied if the contract was governed by the laws of Spain—while by the laws of Pennsylvania there was no limit to the general liability of the owners. It was held by Judge Story, that the owners' liability was governed by the law of Massachusetts, and that the extent of the master's authority to bind the owners was that given by the law of Massachusetts. Judge Story says: "If the ship is owned and navigated under the flag of a foreign country, the authority of the master to contract for, and bind the owners, must be measured by the laws of that country, unless he is held out to persons in other countries, as possessing a more enlarged authority. He is but an agent, and no person dealing with him has a right to suppose that he is clothed with any authority beyond what the laws of the country, to which the ship belongs, deduces from the nature of his employment."<sup>1</sup>

<sup>1</sup> In support of his position he cites the cases of *The Gratitude*, 3 C. Rob. 240; *The Nelson*, 1 Hagg. 169; *The Aurora*, 1 Wh. 96; *The Virgin*, 8 Peters, 538; *The Packet*, 3 Mason, 255, as illustrative of the doctrine. See, also, *The Fortitude*, 3 Sumner, 228.

The law which governs vessels admitted by registry or enrolment

The intention of the parties in such cases where there is a conflict of law is presumably that the law of the country of the carrier vessel will govern the validity and interpretation of the contract.<sup>1</sup>

The interpretation, however, of a marine policy of insurance on cargo of a foreign vessel is governed by the law of the country of the insurer as to what constitutes a loss by peril of the sea as to contracts made at the insurer's home office.<sup>2</sup>

It appears to be more reasonable to hold that the fact that a bill of lading is signed in one country for a contract of carriage to be performed on the high seas to another, will not carry the law of the

to sail under the flag of the United States, considers such vessels a part of the mercantile marine of the country whose law only will probably be considered by foreign tribunals as governing the relation of the owners and the master. A vessel, although the personal property of the citizen of a state so as for some purposes to be effected by the law of the domicile of the owner (*Crapo v. Kelly*, 16 Wall. 610) can hardly be called a vessel of a state under the laws of which it may be built and owned, but cannot be used and employed as a vessel of the commercial marine of the United States, except under the authorization of the navigation laws of the United States. See opinion of Bradley, J., dissenting, in *Crapo v. Kelly*, 16 Wall. at p. 642. Judge Story's application of the laws of Massachusetts, limiting the liability of ship owners, was before the enactment of the act of United States, which superseded the state law.

<sup>1</sup> *The Peninsular and Oriental St. Nav. Co. v. Shand*, 3 Moo. P. C. C. (N. S.) 272; *Lloyd v. Guibert*, L. R. 1 Q. B. 115.

<sup>2</sup> *Greer v. Poole*, L. R. 5 Q. B. D. 272.

port where the contract is entered into with the ship around the world, in its relation to the cargo, wherever it goes throughout the voyage.<sup>1</sup> Mere contact does not subject a vessel, except in a modified degree, to the laws of the port,<sup>2</sup> and a case decided in the courts of Pennsylvania by the late Chief Justice Sharswood is in point. The plaintiff bought, at the office of the company in Philadelphia, a ticket for passage from Philadelphia to Atlantic City over a railroad in New Jersey owned by a New Jersey corporation. The liability of the carrier was governed by the law of New Jersey and not by the law of Pennsylvania, although the transit commenced by a ferry boat from the Pennsylvania side of the river.<sup>3</sup> A case in Massachusetts is to the same effect; stipulations in a bill of lading, invalid by the law of the place of shipment, were enforced in Massachusetts under the laws of that state, which was the ultimate place of destination of the goods and in which suit was brought.<sup>4</sup> Dr. Wharton rejects the place of contract as supplying the interpretation law,<sup>5</sup> and suggests, where there is a contract to

<sup>1</sup> *Lloyd v. Guibert*, L. R. 1 Q. B. 115.

<sup>2</sup> *St. Louis v. The Ferry Co.*, 11 Wall. 423.

<sup>3</sup> *Brown v. The C. & A. R. R. Co.*, 83 Penna. St. Rep. 316.

<sup>4</sup> *Hoadley v. Northern Trans. Co.*, 115 Mass. 304.

<sup>5</sup> *Conflict of Laws*, § 471.



carry, by a single company, through different countries, and where the termini of the carriage are in different countries, that the preponderance of opinion is to the effect that in determining the interpretation of a contract of carriage, the law of the carrier's principal office is to prevail.<sup>1</sup> This cannot be accepted without so many reservations as to destroy its character as a rule governing the interpretation of contracts. A corporation exercising its functions in other countries than that of its origin is treated as an inhabitant of such country as much as an individual foreigner domiciled or transacting business there.<sup>2</sup> This is the case with insurance and banking companies, and the same rule would govern express companies and railroads operated outside the limits of the state of their origin. The law of water carriage must be modified by the fact that the carrier's occupation, except as to the termini, is conducted on the neutral ground of the sea, as to which no general maritime law, governing all nations alike, exists,<sup>3</sup> and the solution which applies the law of the vessel's nationality, called the law of the flag, seems to be the only one capable of general application in the

<sup>1</sup> Wharton's Conflict of Laws, § 471.

<sup>2</sup> *Ex parte Schollenberger*, 96 U. S. 369 ; *Newby v. Van Open*, L. R. 7 Q. B. 293.

<sup>3</sup> *The Scotland*, 105 U. S. 24 ; *The Scotia*, 14 Wall. 170 ; *The Gaetano & Maria*, L. R. 7 P. D. 137.

absence of any international agreement. The solution of this question is being aided by the efforts of the Association for the Reform and Codification of the Law of Nations, which has adopted uniform rules on the subject of general average, and is endeavoring to introduce one uniform bill of lading which will govern the law of carriage by water in vessels of every nation and wheresoever the carrier's contract commences or ends.

Judge Story says that this rule of international law is to be applied with proper qualifications and limitations. The rule cannot prevail or be obligatory where the contract, although to be performed or executed in a foreign country, is pronounced invalid or void by the law of the country where it is made, as in the case of a contract in Massachusetts for a voyage from Africa to foreign markets in the slave trade. The case suggested is one of prohibited trade, but it will not apply to a difference existing as to the power of the master to bind or the extent of the obligation and duties of the owners. A contract to be performed in a foreign country is not illegal because it would not be enforced if to be performed in the place of the contract or because a different interpretation would be placed on it there. Judge Story further states that the law of the port of loading or delivery only governs the contract, as to the port regu-

lations, which make certain methods of loading or delivery binding on the owners.<sup>1</sup> In that respect a contract is divisible as to the place of performance, and may be governed by different laws.<sup>2</sup> But foreign vessels coming into the ports of the United States subject themselves to the municipal law of the country in respect to supplies and repairs, and become subject to all liens created or given by the municipal law of the port,<sup>3</sup> and pilotage laws are treated as laws of the port, which govern a vessel when entering a port in charge of a pilot licensed by the authorities of the port,<sup>4</sup> without regard to the law of the nationality of the vessel.

§ 39. The priority given by the maritime law as enforced in the courts of the United States, however, will not be altered by reason of a different effect given by the law as enforced in the courts of the nation to which the vessel belongs.<sup>5</sup> As all questions of administering the rules of priorities are extrinsic and are governed by the law of the

<sup>1</sup> *Bertellote v. Cargo of Brimstone*, 3 Fed. Rep. 661.

<sup>2</sup> *Pope v. Nickerson*, 3 Story at pp. 484-5.

<sup>3</sup> Wharton's Conflict of Laws, § 358.

<sup>4</sup> *The China*, 7 Wall. 53; *Wilson v. McNamee*, 102 U. S. 572; *Smith v. Condry*, 1 How. 28; *The Eagle*, 8 Wall. 15; *In re Insurance*, 22 Fed. Rep. 109.

<sup>5</sup> *The Selah*, 4 Sawyer, 40; *The Graf Klot Trautvetter*, 8 Fed. Rep. 833; *The Union*, Lush. 128; *The Alexander*, 1 Dodson, 278; *The Prince George*, 4 Moore, P. C. C. 25.

forum,<sup>1</sup> and the law governing the relations of a vessel to a port, including the manner of loading and delivery, is administered by that of the port.<sup>2</sup> Salvage is awarded as against foreign vessels according to the law of the forum.<sup>3</sup>

§ 40. The proper law must be proved as a fact.<sup>4</sup> The method in which the law may be proved is a question in which there is some contradiction. In *The Pawashich*,<sup>5</sup> Lowell, J., arrives at the conclusion that the maritime law of England may be proved in the admiralty court, not by experts only, but by text-writers of authority and by the printed reports of adjudged cases; and that the written law may be proved by the printed copies and be construed with the aid of text-books as well as of experts, and he points out that this was the method by which the law of England was applied to a contract of affreightment by an English master in reference to an English ship in *The Maggie Hammond*.<sup>6</sup> Perhaps this statement will only apply

<sup>1</sup> *Harrison v. Sterry*, 5 Cranch, 289; *The Union*, Lush. 128.

<sup>2</sup> *Pope v. Nickerson*, 3 Story, at pages 484-5; *Bertellote v. Cargo of Brimstone*, 3 Fed. Rep. 661; *The M. S. Bacon v. The Erie & Western Trans. Co.*, *ibid.* 344; Wharton's *Conflict of Laws*, § 437 *a*.

<sup>3</sup> *Anderson v. The Edam*, 13 Fed. Rep. 135.

<sup>4</sup> *Talbot v. Seeman*, 1 Cranch, 1; *The Pawashich*, 2 Low. 142.

<sup>5</sup> 2 Low. 142.

<sup>6</sup> 9 Wall. 435. See, also, *Ennis v. Smith*, 14 How. 400-26.

as intimated by Shaw, C. J., in *Carnegie v. Morrison*,<sup>1</sup> to the law of England, our relations with the law of which country are so intimate as to relieve a court of the necessity of asking the aid of experts.

In the late case of *The Montana*,<sup>2</sup> in which the question turned in part on the right of an English ship-owner to limit his liability for the negligence of his servants, the Circuit Court held that, as there was no proof of the English law, the consideration did not enter into the case, and it was decided under the Federal law. In other cases the court seems to have examined into the foreign law without the aid of experts. In the *Julia Blake*,<sup>3</sup> the court, although not deciding that the liability of a bottomry bond was governed by the law of England, refers to the adjudications of English courts as to the rights and obligations of the masters of English vessels if that law applied.<sup>4</sup> It must be considered also that a doubt exists whether it is a judicial fact for the court or a question for the

<sup>1</sup> 2 Metc. 381.

<sup>2</sup> 17 Fed. Rep. 377, not yet reported in the Circuit Court. The vessel loaded at New York within the laws of which state the exemption would have been valid, although not by the federal law.

<sup>3</sup> 107 U. S. 418.

<sup>4</sup> The authorities will be found cited in Wharton on Conflict of Laws, §§ 771-75.

jury. In the admiralty courts, where the court sits without the aid of a jury, the relaxation of the ancient rules in relation to the proof of foreign statutes, referred to in the case of *Barrows v. Downs*,<sup>1</sup> will be attended with less danger than where it is an issue of fact for the jury; admiralty courts admit proof of facts by other methods than would be permissible in an action tried before a jury, and it would seem that a court sitting for the trial of a question of fact may use its own knowledge in the same manner as to a certain extent the jury can.<sup>2</sup>

<sup>1</sup> 9 Rhode Island, 446.

<sup>2</sup> *The Peerless*, Lush. 30-40; in cases of wages against British ships, the court takes judicial notice of the Merchant Shipping Act, of which there is no doubt. *The Alps*, 19 Fed. Rep. 139-141; *The Adolph*, 7 Fed. Rep. 301; *The Montapedia*, 14 Fed. Rep. 427; *The British Brig Wexford*, 3 Fed. Rep. 577. The court can require the foreign law to be proved where there is a doubt; see the case of *the Patria*, L. R. 3 A. & E. at p. 461, where an expert was called to explain articles of the German code.

## CHAPTER III.

## THE MARITIME LIEN AND ITS PRIORITY.

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§ 41. The maritime lien is a right or privilege in the vessel to be carried into effect by legal pro-

cess.<sup>1</sup> Whenever a lien or claim is given upon the thing by the maritime law, the admiralty will enforce it by its process *in rem*, and it is the only court competent to enforce it.<sup>2</sup> It is derived from the civil law, and although a lien created by the maritime law is not, strictly speaking, a Roman hypothecation, still it resembles it and is often called a tacit hypothecation.<sup>3</sup> It also somewhat resembles what is called a privilege in that law, that is, a right of priority of satisfaction out of the thing in a concurrence of creditors.<sup>4</sup> It does not transfer the property, but only gives the creditor a privilege or claim upon it to be carried into effect by legal process.<sup>5</sup> But it is much more than a right to sue,<sup>6</sup> it is a *jus in re*,

<sup>1</sup> *The Nestor*, 1 Sumner, 73; *The Bold Buccleugh*, 7 Moo. P. C. C. 267; *The City of Mecca*, L. R. 6 P. D. 106.

<sup>2</sup> Story, J., in *The Nestor*, 1 Sumner, 73, and Grier, J., in *Vandewater v. Mills*, 19 How. 82.

<sup>3</sup> Baron Parke speaks of an hypothecation as "well known in the civil law and distinguished from a mortgage as well as a pledge or pawn at common law, the former of which transfers the property, the latter a lien on the chattel, and is void without actual possession; but hypothecation gives only a right to be enforced against the subject of it through the medium of process." *Stainbank v. Shepard*, 18 C. B. 418-442.

<sup>4</sup> Abbott on Shipping, P. 2, ch. 3, § 10.

<sup>5</sup> Abbott on Shipping, P. 2, ch. 3, § 10; *The Lottawana*, 21 Wall. 558; *The Belfast*, 7 Wall. 624; *Imrie v. Castrique*, 98 E. C. L. R. 405. *The City of Mecca*, L. R. 6 P. D. 106.

<sup>6</sup> *The Arcturus*, 18 Fed. Rep. 743.



or right in the thing itself, without actual possession or any right of possession, and can be executed and divested only by a process *in rem*, and is treated as a proprietary right.<sup>1</sup> It does not require possession to accompany it; Chief Justice Taney's remarks in *Bags of Linseed*<sup>2</sup> refer only to the lien given by the maritime law for freight which is not a privilege but a right to retain. It is consistent with a credit given for its payment and may accompany the thing itself into the hands of the purchaser without notice,<sup>3</sup> and is not destroyed or impaired by a forfeiture of the vessel for a violation of the municipal law prior to the attaching of the lien,<sup>4</sup> although the interest of the owners may be lost by such forfeiture, without their privity or consent;<sup>5</sup> nor is the lien lost by a sheriff's sale under the judgment of a state court at the suit of a third party against the owner after the lien accrues,<sup>6</sup> and the maritime liens on freight will not

<sup>1</sup> *Ward v. Chamberlain*, 2 Black, 430; *Vandewater v. Mills*, 19 How. 82; *The Lottawana*, 21 Wall. 558.

<sup>2</sup> 1 Black, at p. 113.

<sup>3</sup> *The Hilarty*, 1 Bl. & How. 90; *The St. Lawrence*, 1 Black, 522; *Ramsey v. Allegre*, 12 Wh. 611; *Certain Logs of Mahogany*, 2 Sumner, 589; *The Kimball*, 3 Wall. 37.

<sup>4</sup> *The St. Jago de Cuba*, 9 Wh. 409.

<sup>5</sup> *The Malek Adhel*, 2 How. 210.

<sup>6</sup> *The Gazelle*, 1 Sprague, 378; *The Julia Ann*, *ibid.* 382; *The William T. Graves*, 14 Blatch. 189.

be affected by an attachment issued by a state court prior to the filing of the libel, and freight money so attached can be ordered to be paid into the registry.<sup>1</sup>

It is not indelible, and may be lost by neglect or delay to enforce it, at least when the rights of other persons have intervened,<sup>2</sup> but the statutes of limitation do not apply to such liens, nor do presumptions of payment arise from lapse of time.<sup>3</sup>

§ 42. It is said that, except in bottomry and salvage, the lien exists as ancillary to the payment of some personal claim.<sup>4</sup> While this is true of claims arising out of contracts, the maritime law in cases of torts treats a vessel as an actor or sentient being having a personality capable of doing wrong, and the lien can be enforced against the vessel as a delinquent, without regard to the question of ownership or agency,<sup>5</sup> and in cases of contract, where the

<sup>1</sup> *The Caroline*, 1 Low. 173; *The Sailor Prince*, 1 Ben. 234.

<sup>2</sup> The admiralty will not, in cases of this sort, sit for the purpose of enforcing stale claims. *The Nestor*, 1 Sumner, at 85, per Story, J.

<sup>3</sup> *The Key City*, 14 Wall. 653; *Reed v. The Ins. Co.*, 95 U. S. 23.

<sup>4</sup> *Taylor v. Carryl*, 20 How. at 599; *The Druid*, 1 Wm. Rob. at 399.

<sup>5</sup> *The China*, 7 Wall. 53; *The J. W. French*, 13 Fed. Rep. 916; *The Malek Adhel*, 2 How. 210. *Contra*, *The Druid*, 1 Wm. Robinson, 392, Dr. Lushington held that a ship was not

general owner intrusts the special owner, either as master or hirer, with the entire control and management of the ship, he thereby assents to the creation of liens binding on his interest in the vessel as security for the performance of contracts for affreightments and for supplies, furnished in the course of the lawful employment of the vessel,<sup>1</sup> and to liens for injuries to cargo and for collision, for which he may not become personally liable.<sup>2</sup>

The claim or privilege in the *res* thus arising, however, becomes subject to all subsequently occurring liens or privileges, whether growing out of supplies to preserve the property as a security for the creditor, or for the redress of wrongs inflicted on the property of others by the *res* in which the creditor has an interest; thus affecting the administration of priorities in a manner differing from those not arising under the maritime law.<sup>3</sup> The rule of priority adopted in courts of common law

liable for the unauthorized acts of the master in wilfully inflicting injury on another vessel. "The guilt of a thing is entirely without reference to its ownership." *Proceedings in Rem*, by Waples, § 140.

<sup>1</sup> *The Freeman v. Buckingham*, 18 How. 182; *Thomas v. Osborn*, 19 How. 22; *Pollard v. Vinton*, 105 U. S. 7; *The City of New York*, 8 Blatch. 187.

<sup>2</sup> *Thorp v. Hammond*, 12 Wall. 408.

<sup>3</sup> See *post*, § 66.

and of equity, *qui prior est tempore potior est jure*, does not govern in admiralty causes, but is often just the reverse.<sup>1</sup>

§ 43. The lien arises out of contracts, services and supplies, and from torts.

The maritime lien for supplies and services has its origin in the necessities of trading vessels, visiting distant localities where neither the master nor the owners have credit. The fundamental principle of the maritime law is that a ship is made to plow the sea and not to rot by the walls. It is created for the benefit of the vessel and not for that of the creditors.<sup>2</sup>

The lender of money or the person making advances<sup>3</sup> to the master to supply the ship's necessities in a foreign port has the benefit of the same lien which would attach for the supplies furnished and paid for through the money raised for that

<sup>1</sup> *The Guiding Star*, 18 Fed. Rep. 263, per Matthews, J.

<sup>2</sup> *The St. Jago de Cuba*, 9 Wh. 409: "The vessel must get on. This is the consideration that controls every other, and not only the vessel, but even the cargo, is *sub modo* subjected to this necessity." Per Johnson, J. See opinion of Coxe, J., *In re Insurance Co.*, 22 Fed. Rep. 109-115.

<sup>3</sup> *Thomas v. Osborn*, 19 How. 22; *The Emily Souder*, 17 Wall. 666; *The Lulu*, 10 Wall. 192; *The Neversink*, 5 Blatch. 539; *Ins. Co. v. Baring*, 20 Wall. 159, in this case money advanced to purchase cargo for a vessel is spoken of as creating a lien; the point, however, did not arise in the case and the existence of the

purpose, and with the same rank.<sup>1</sup> The privilege of the material man who supplies a foreign ship extends to the creditor who advances money for the purchase of necessaries and to advances for the payment of an already existing debt for necessaries.<sup>2</sup> The distinction "taken in the opinion of *The Larch*,<sup>3</sup> between our law and that of Rome—namely, that the latter, by a laudable fiction, presumed an assignment, when, in fact, there had been a mere payment, while our law recognizes no such fiction—cannot be maintained."<sup>4</sup>

All advances of money made to pay off claims of a maritime nature upon the credit of the vessel, which are liens in the admiralty, have the benefit of the lien with the same rank as the original claims,<sup>5</sup> and it has been extended to subsequent loans to pay off previous advances for such purposes.<sup>6</sup>

lien from such a contract is more than doubtful. *Thomas v. Osborn*, 19 How. 22; *The Ole Oleson*, 20 Fed. Rep. 384; *The Mary*, 1 Paine, 671.

<sup>1</sup> *The Guiding Star*, 18 Fed. Rep. 263.

<sup>2</sup> *The Tangier*, 2 Low. 7; *The Thomas Sherlock*, 22 Fed. Rep. 253.

<sup>3</sup> 2 Curtis, at 429.

<sup>4</sup> Lowell, J., in *The Tangier*, 2 Low. 7.

<sup>5</sup> *The Guiding Star*, 18 Fed. Rep. 263; *The Isaac May*, 21 Fed. Rep. 687.

<sup>6</sup> *The Thomas Sherlock*, 22 Fed. Rep. 253.

§ 44. The services of a stevedore in discharging a vessel are maritime in their nature and are a lien on foreign vessels to which they are rendered.<sup>1</sup> The services of a ship-keeper in port are not maritime,<sup>2</sup> but the services of a watchman to a foreign vessel detained at quarantine in consequence of the sickness of the crew are.<sup>3</sup> The storage of sails is not a service pertaining to navigation and creates no lien.<sup>4</sup> The services of a cooper in the delivery of cargo to be coopered at the ship's expense are maritime, and create a lien.<sup>5</sup> The weighing and inspecting of the

<sup>1</sup> *The Canada*, 7 Fed. Rep. 119; *The George T. Kemp*, 2 Low. 477, refusing to follow *The A. R. Dunlap*, 1 Low. 350; *Roberts v. The Windermere*, 2 Fed. Rep. 722; *The Hattie M. Bain*, 20 Fed. Rep. 389; *The Velox*, 21 Fed. Rep. 479; *The Circassian*, 1 Ben. 209; *The Kate Tremaine*, 5 Ben. 60; *The Emily Souder*, 17 Wall. 666; but not at the home port, *The E. A. Barnard*, 2 Fed. Rep. 712. See, also, *The Ole Oleson*, 20 Fed. Rep. 384; *Paul v. The Ilex*, 2 Woods, 229. In *The Senator*, 21 Fed. Rep. 191, services of a stevedore were put on the same footing as those of mariners, and are held to create a maritime lien without reference to the place at which they are rendered. *The Velox*, 21 Fed. Rep. 479.

<sup>2</sup> *Gurney v. Crockett*, Abb. Adm. 490; *The Island City*, 1 Lowell, 375; *The E. A. Barnard*, 2 Fed. Rep. 712; *The John T. Moore*, 3 Woods, 61.

<sup>3</sup> *The Erinagh*, 7 Fed. Rep. 231; *The General Meade*, 21 Fed. Rep. 923.

<sup>4</sup> *Hubbard v. Roach*, 2 Fed. Rep. 393.

<sup>5</sup> *The Onore*, 6 Ben. 564.

cargo of a vessel,<sup>1</sup> and the removal of ballast of foreign ships create a maritime lien.<sup>2</sup> A ship-broker has no lien for services in procuring a charter party,<sup>3</sup> and premiums of insurance are not necessities for a ship.<sup>4</sup> But the services of adjusters in relation to the cargo of a stranded vessel are held to be maritime.<sup>5</sup> Money advanced to pay such expenses as towage, pilotage, custom-house dues, consular fees, and medical attendance for the crew, are ranked with necessary supplies, and repairs.<sup>6</sup> But it is held that money advanced to relieve a vessel from attachment in a foreign port for a general debt of the owner, which is not a maritime lien, will not rank as money supplied for the ship's necessities and that the master has no right to hypothecate the vessel for that purpose.<sup>7</sup> The question is not without difficulty, there is no authority in the

<sup>1</sup> *Constantine v. The River Queen*, 2 Fed. Rep. 781.

<sup>2</sup> *The Windermere*, 2 Fed. Rep. 722.

<sup>3</sup> *The Thames*, 10 Fed. Rep. 848.

<sup>4</sup> *The Jennie B. Gilkey*, 19 Fed. Rep. 127. *In re Insurance Co.*, 22 Fed. Rep. 109. *Contra*, *The Dolphin*, 1 Flippin, 580; in *The Guiding Star*, 18 Fed. Rep. 263, the lien was given by the state statute.

<sup>5</sup> *The Coast Wrecking Co. v. The Phoenix Ins. Co.*, 7 Fed Rep. 236; affirmed in 13 Fed. Rep. 127.

<sup>6</sup> *The Emily Souder*, 17 Wall. 666.

<sup>7</sup> *The A. R. Dunlap*, 1 Low. 350; *The North Star*, Lush. 45.

master to act as agent for the owners except in relation to the vessel's employment.<sup>1</sup> Yet the authority of the master extends to enable him to hypothecate the vessel for all port charges,<sup>2</sup> including legal expenses.<sup>3</sup> The arrest of a vessel by legal process might create a necessity which would call upon him to act in good faith to protect his owners' interest, as such an arrest would not relieve the vessel from responsibility to the cargo for the due prosecution of the voyage and his power to act might arise from necessity. Such an arrest might be held as creating a local lien,<sup>4</sup> which would authorize the master to hypothecate the vessel.<sup>5</sup> Still the extension of the master's authority is not desirable, and with the ease of communication with owners such necessity is not likely to arise.

§ 45. By the American law the master has no lien on the vessel,<sup>6</sup> and such was the English law until the lien was given by statute.<sup>7</sup> The court,

<sup>1</sup> *The Aurora*, 1 Wheaton, 96.

<sup>2</sup> *The Prince George*, 4 Moore P. C. C. 25.

<sup>3</sup> *The Edmond*, Lush. 211.

<sup>4</sup> *The Vibilia*, 1 Wm. Rob. 1.

<sup>5</sup> See *The Insurance Co. v. Baring*, 20 Wall, 159.

<sup>6</sup> *The Orleans v. Phœbus*, 11 Pet. 175; *Williard v. Dorr*, 3 Mason, 91; *The Grand Turk*, 1 Paine, 73; *The Imogene M. Terry*, 19 Fed. Rep. 463; *Fisher v. Willing*, 8 S. & R. (Pa.) 118.

<sup>7</sup> *The Favourite*, 2 C. Rob. 232.



however, enforces the lien of the master under the English law when the voyage is broken up in this country.<sup>1</sup> He can hypothecate the cargo and create a lien in favor of others,<sup>2</sup> but he himself must stand on the personal credit of his owners.<sup>3</sup> "The rule is supposed, by the English courts, to be founded in sound policy, as being conducive to the interests of navigation and commerce; for it would be a great inconvenience, if, on a change of the master for misbehavior, or other cause, he would be entitled to keep possession of the ship, until he was paid, or to enforce the lien while abroad and compel a sacrifice of the ship."<sup>4</sup> The existence of such a lien in favor of the master by the foreign law does not entitle him to retain the possession against the owners who desire to dispossess him.<sup>5</sup> The master is said to have a lien on the freight for all his advances and responsibilities incurred upon account

<sup>1</sup> *The Pawashick*, 2 Low. 142. See Story, *Conflict of Laws* (8th ed.), p. 453.

<sup>2</sup> *The Paragon*, 1 Ware, 322.

<sup>3</sup> *Wilkins v. Carmichael*, Douglas, 101; *Smith v. Plummer*, 1 Barn. & Ald. 575.

<sup>4</sup> Conkling's *Admiralty*, p. 79; 3 Kent. Com. 167; see *Maritime Liens*, by Theodore M. Etting, 21 Am. L. Reg. (N. S.) pp. 81-83.

<sup>5</sup> *The Brisk*, 4 Ben. 252.

of the ship.<sup>1</sup> Such a lien would arise from his personal responsibility incurred for contracts in the course of the vessel's employment and give rise to a lien on the freight for wages, but not on the ship itself.<sup>2</sup>

§ 46. It has been doubted whether the maritime lien passes by assignment or transfer of the claim.<sup>3</sup> In cases arising out of personal services, such as the wages of seamen, the lien is treated as a personal one, which will not pass to the assignee. The reason probably is, that the law discourages the assignment of such claims, to prevent advantage being taken of the improvidence of seamen. Wages assigned without the assent of the court do not always carry the seaman's privilege,<sup>4</sup> and

<sup>1</sup> *The Packet*, 3 Mason, 255; *Ingersoll v. Van Bokkelin*, 7 Cowen (N. Y.) 670; *Lane v. Penniman*, 4 Mass. 92; *Lewis v. Hancock*, 11 *ibid.* 72; *Cowing v. Snow*, *ibid.* 414; *Shaw v. Gookin*, 7 New Hamp. 16.

<sup>2</sup> *Ex parte Clarke*, 1 Sprague, 69, and *The Spartan*, 1 Ware, 149, would seem to admit the right of the master's lien. Curtis, J., does not question the right of the master to collect sufficient freight to reimburse himself for advances, but he doubts his lien for wages. *The Larch*, 2 Curtis, at p. 433.

<sup>3</sup> *The Champion*, 1 Br. Adm. 520; *The A. D. Patchin*, 12 Law Rep. 21.

<sup>4</sup> *The Æolian*, 1 Bond, 267; *The A. D. Patchin*, 12 Law Rep. 21; *The Norfolk and Union*, 2 Hughes, 123; *The Adolph*, 3 Hagg. 249; *The Cornelia Henrietta*, L. R. 1 A. & E. 51; *The*

the same ruling has been made as to personal services in the nature of salvage,<sup>1</sup> and the admiralty courts have refused to allow attachments by garnishee process for wages due to seamen under proceedings in the state courts, to be set up as a defence in proceedings by the seaman to enforce his claim *in rem* against the vessel,<sup>2</sup> or *in personam* against the owner,<sup>3</sup> although the attachment was held valid under the law of the state in the highest state court.<sup>4</sup> But actual payment enforced by legal process under such an attachment was allowed as a set-off in the admiralty.<sup>5</sup> But except in such cases the purchase of a debt carries with it all the securities which the creditor had for its enforcement,<sup>6</sup> and this rule gives subrogation to an assign-

Kammerhevie Rosenkrants, 1 Hagg. 62. And the principle has been doubted. *The Sarah J. Weed*, 2 Low. 555; see, also, *Ross v. Bourne*, 14 Fed. Rep. 858.

<sup>1</sup> *The George Nicholas*, 1 Newb. 449.

<sup>2</sup> *McCarty v. The City of New Bedford*, 4 Fed. Rep. 818.

<sup>3</sup> *Bourne v. Ross*, 17 Fed. Rep. 703.

<sup>4</sup> *Eddy v. O'Hara*, 132 Mass. 56.

<sup>5</sup> *The City of New Bedford*, 20 Fed. Rep. 57.

<sup>6</sup> *The Boston*, 1 B. & How. 309; *Cobb v. Howard*, 3 Blatch. 524; *Swett v. Black*, 1 Sprague, 574; *The American Eagle*, 19 Fed. Rep. 879; *The Pride of America*, 19 Fed. Rep. 607; *The Sarah J. Weed*, 2 Low. 555; *The Hull of a New Ship*, 2 Ware, 203; *The Panama*, Olcott, 343.

ment of claims growing out of collision,<sup>1</sup> so that payment by insurers of a loss entitles the insurers to proceed *in rem* for the amount so paid,<sup>2</sup> and entitles the lender of money to a master in a foreign port to pay claims for supplies, which were a lien on the vessel, to the same security against the vessel, as the claims which were paid.<sup>3</sup>

§ 47. But the right of subrogation to the lien is confined to sureties or strangers. Disbursements made by an agent or ship's husband in the usual course of the agency are refused subrogation,<sup>4</sup> and the ship's husband or agent has no lien for disbursements made by him as such against the vessel or its proceeds. The consignee of a ship at a foreign port is not such an agent, and has a lien on the vessel for necessary disbursements.<sup>5</sup> An exception is made where the ship's husband was also a mortgagee in possession to work out the debt from the earnings of the vessel; such ad-

<sup>1</sup> *The Cadiz*, 20 Fed. Rep. 157.

<sup>2</sup> *The Monticello*, 17 How. 152.

<sup>3</sup> *The Emily Souder*, 17 Wall. 666; *Thomas v. Osborn*, 19 How. 22; *The Tangier*, 2 Low. 7; *The Cabot*, Abb. Adm. 150; including wages; *The William F. Safford*, Lush. 69.

<sup>4</sup> *Minturn v. Maynard*, 17 How. 477; *The Larch*, 2 Curtis, 427; *The Sarah J. Weed*, 2 Low. 555; *White v. The Americus*, 19 Fed. Rep. 848.

<sup>5</sup> *The Eliza Jane*, 1 Sprague, 152.

vances were treated as those of a mortgagee who had made them, not in the line of his duty as agent to discharge claims against the vessel, but as a creditor to maintain the security of his mortgage on the vessel.<sup>1</sup>

§ 48. The taking of a note or draft on the owner for the amount of a claim does not of itself divest the lien for supplies,<sup>2</sup> unless taken in satisfaction of the claim, but the burden of proof is on the claimant to show that the draft was accepted in payment of the original demand.<sup>3</sup> Nor is the lien necessarily waived by agreeing to accept a time draft for the amount.<sup>4</sup>

§ 49. The lien arises whenever the vessel is in need of supplies or repairs at a port where her owner does not reside or to which the vessel does not belong.<sup>5</sup> And in the American law the ports

<sup>1</sup> *The J. C. Williams*, 15 Fed. Rep. 558.

<sup>2</sup> *The Acme*, 7 Blatch. 366; *The Guy*, 9 Wall. 758; *The Emily B. Souder*, 8 Blatch. 339; *The Pride of America*, 19 Fed. Rep. 607; *The General Meade*, 20 Fed. Rep. 923; *The Woodland*, 104 U. S. 180.

<sup>3</sup> *The James Guy*, 1 Ben. 112; s. c., 5 Blatch. 496; *Carter v. Townsend*, 1 Cliff. 1.

<sup>4</sup> *The Kimball*, 3 Wall. 37.

<sup>5</sup> *The Lottawana*, 21 Wall. 558; *The America*, 16 Law. Rep. 264; *The General Smith*, 4 Wh. 438; *The St. Jago de Cuba*, 9 Wh. 409.

of the different states of the union are treated in respect to the vessel's ownership as foreign to each other.<sup>1</sup> Chancellor Kent suggests that the distinction between foreign and home ports in relation to the master's power to bind his owners ought to rest, not on the relationship to the government of the country, but to the proximity or remoteness, the facility or difficulty, of communication between the place where the master acts and the place where the owner resides;<sup>2</sup> and it has been held that any place where the owner and vessel are not together is to be deemed a foreign port in respect to the power of the master in a proper case to subject the vessel to a lien,<sup>3</sup> but the rule is now settled that whenever the debt is contracted in a different state jurisdiction from that where the owner resides or the vessel belongs, the lien arises.<sup>4</sup> The increase of facility of communication with the owner's representatives by telegraph does not affect the rule: Thus, supplies furnished at Baltimore to

<sup>1</sup> *The Patapsco*, 13 Wall. 329; *The Lulu*, 10 Wall. 192; *The Kalorama*, 10 Wall. 204; *The Guy*, 9 Wall. 758. The power of the master to raise money while abroad for the necessities of the ship is the most dangerous form in which his authority can be exercised.

<sup>2</sup> 3 Kent, Comm., p. 172, note.

<sup>3</sup> *Johns v. Simons*, 2 Ad. & Ell. (N. S.), 425.

<sup>4</sup> *The Nestor*, 1 Sumner, 73.

a vessel owned in New York,<sup>1</sup> coal furnished to a steamer at New Brunswick, New Jersey, the vessel being owned in New York,<sup>2</sup> and to a vessel belonging to New York at Jersey City, were held to create a lien.<sup>3</sup>

The home port of a vessel is that where her owner, or if more than one, her managing owner resides.<sup>4</sup> The place of ownership is not necessarily determined by the recording of a bill of sale at the home port,<sup>5</sup> as the insertion of the registry or enrolment required in the bill of sale is not necessary to transfer the ownership of a vessel which may be transferred by parol, but is only required to title it to the privilege and character of an American vessel.<sup>6</sup>

<sup>1</sup> *The James Guy*, 5 Blatch. 496.

<sup>2</sup> *The Neversink*, 5 Blatch. 539; *The Plymouth Rock*, 13 Blatch. 505.

<sup>3</sup> *The Sarah J. Weed*, 2 Low. 555. Supplies furnished at Jersey City and Hoboken were treated as furnished at the port of New York under a statute of that state which requires claims to be filed within twelve days after the vessel should leave the port; *The Arctic*, 22 Fed. Rep. 126.

<sup>4</sup> Act of Dec. 31, 1792, § 3, Rev. Statutes, § 4141. *Hays v. The Pacific Mail S. S. Co.*, 17 How. 596; *St. Louis v. The Ferry Co.*, 11 Wall. 423; *Morgan v. Parham*, 16 Wall. 471; *White's Bank v. Smith*, 7 Wall. 646; *Blanchard v. The Martha Washington*, 1 Cliff. 463; *The Indiana, Crosbe*, 479.

<sup>5</sup> *The Plymouth Rock*, 13 Blatch. 505; *White's Bank v. Smith*, 7 Wall. 646.

<sup>6</sup> *The Amelie*, 6 Wall. 18.

The question of the place of ownership in respect to supplies is always one of fact, and is not determined by the registry;<sup>1</sup> although as against a person misled by a foreign registration, and dealing on the credit of the vessel as a foreign one, the owner would not be allowed to assert the contrary.<sup>2</sup> Where the party furnishing supplies at New York to a vessel, put under the British flag, knew that the owner resided there, the vessel was treated as domestic, and no lien was obtained by the creditor.<sup>3</sup>

Supplies furnished to a vessel at a port where the owner resides will not create a lien, although the vessel is registered at a foreign port, or at the port of another state.<sup>4</sup> Supplies and materials

<sup>1</sup> *The Mary Chilton*, 4 Fed. Rep. 847; *The E. A. Barnard*, 2 Fed. Rep. 712.

<sup>2</sup> Per Butler, D. J., in *The E. A. Barnard*, 2 Fed. Rep. 712; *The St. Jago de Cuba*, 9 Wheat. 409; *The Walkyrien*, 11 Blatch. 241.

<sup>3</sup> *The Alice Tainter*, 14 Blatch. 41.

<sup>4</sup> *The Golden Gate*, 1 Newb. 308; s. c., 5 Am. L. Reg. 142; *The E. A. Barnard*, 2 Fed. Rep. 712; *Beinecke v. The Secret*, 3 Fed. Rep. 665; *The Norman*, 6 Fed. Rep. 406; *The Alice Tainter*, 5 Ben. 391; s. c., 14 Blatch. 41; *The Mary Chilton*, 4 Fed. Rep. 847; *The Plymouth Rock*, 13 Blatch. 505. *Contra*, *The George T. Kemp*, 2 Low. 477. See *The St. Jago de Cuba*, 9 Wh. 409; *The Albany*, 4 Dill. 439.

In *The Rapid Transit*, 11 Fed. Rep. 322, Hammond, D. J., says (page 330): "But in a place where he (the owner) resides



furnished by a foreigner through his agent to a vessel at her home port will not create a lien,<sup>1</sup> but the fact that the supplies were furnished to a vessel in a foreign port by a citizen of the same state to which the vessel belongs, will not prevent a lien attaching to a vessel as foreign.<sup>2</sup>

The port of registry or enrolment is *prima facie* the home port of the vessel;<sup>3</sup> but it may be other-

the lien does not arise under any circumstances, unless given by the local law. . . . This must apply to part owners as well as sole owners. There is no reason for confining it to one part owner more than another. . . . No lien arises for material men in any state where an owner or part owner resides . . . . No principle to warrant the argument that the denial of the lien must be restricted to that state or port where the vessel is enrolled or where her managing owner resides." See, also, *Stephenson v. The Francis*, 21 Fed. Rep. 715; but as a general rule parties furnishing supplies at the home port deal only with the managing owners of the vessel. *The Indiana*, Crabbe, 479. One who furnishes supplies to the master at a port of another state other than that of the managing owner would not be supposed to rely on the personal credit of a part owner residing there, nor that the authority of the master was superseded by the presence of such an owner.

<sup>1</sup> *The Kosciusko*, 11 N. Y. Obs. 38; *The Eliza Jane*, 1 Sprague, 152.

<sup>2</sup> *The Sarah J. Weed*, 2 Low. 555.

<sup>3</sup> *The Jennie B. Gilkey*, 19 Fed. Rep. 127; *The Superior*, Newb. 176; *The Sarah Starr*, 1 Sprague, 453; *The Martha Washington*, 1 Cliff. 463-466.

wise; and if the libellant is not misled,<sup>1</sup> the fact that the master is charterer and managing owner will not make a port from which he is in the habit of sailing the home port of the vessel if registered elsewhere, if the master does not reside at that port.<sup>2</sup>

The name of the place painted on the stern as required by the statute<sup>3</sup> is said to have been intended to give to all persons interested notice of the home of the vessel.<sup>4</sup> But this will not estop the owner who contracted the debt from denying the existence of a lien, if he was a resident of the port where the repairs were furnished.<sup>5</sup>

§ 50. A person may also be the owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive command and navigation of the ship. But where the general owner retains the possession, command, and navigation of the ship, the charter party is considered as a mere contract of affreightment, and the freighter is not clothed with the character or legal responsibility of ownership.<sup>6</sup>

<sup>1</sup> *The Mary Chilton*, 4 Fed. Rep. 847.

<sup>2</sup> *The Jennie B. Gilkey*, 19 Fed. Rep. 127.

<sup>3</sup> Rev. Stat. § 4178.      <sup>4</sup> *The Martha Washington*, 1 Cliff. 463.

<sup>5</sup> *The Mary Chilton*, 4 Fed. Rep. 847.

<sup>6</sup> *Marcadier v. The Chesapeake Ins. Co.*, 8 Cranch, 89; *Colvin v. Newberry*, 6 Bligh (N. S.), 167; *Certain Logs of Mahogany*, 2 Sumner, 589.

Charterers who hire and sail the vessel are considered the owners *pro hac vice*, and supplies furnished the vessel on the order of such charterers at the port of their residence do not bind the vessel as foreign, because the vessel was actually owned and enrolled elsewhere.<sup>1</sup>

Supplies furnished on the order of an agent of the charterers, who are owners for the voyage, at a foreign port, bind the vessel, although they are not the agents of the general owners.<sup>2</sup> If furnished to the master of a foreign vessel without knowledge that the owner resides at the port, the lien attaches.<sup>3</sup> And supplies ordered at a foreign port by the owner's agent, other than the master, will create a lien.<sup>4</sup> But while the presence of an owner defeats the implied authority of the master, a contract with the owner at a foreign port does not necessarily invalidate the lien; such a lien may arise

<sup>1</sup> The Golden Gate, 5 Am. L. Reg. 142; *Beinecke v. The Secret*, 3 Fed. Rep. 665; *The Secret*, 15 Fed. Rep. 480; *The Norman*, 6 Fed. Rep. 406; *Stephenson v. The Francis*, 21 *ibid.* 715.

<sup>2</sup> *The City of New York*, 3 Blatch. 187; *The India*, 16 Fed. Rep. 262; *s. c.*, 21 Blatch. 268; *The Sydney L. Wright*, 5 Hughes, 474.

<sup>3</sup> *The Walkyrien*, 11 Blatch. 241; *The St. Jago de Cuba*, 9 Wh. 409; *The Alice Tainter*, 5 Ben. 391.

<sup>4</sup> *The Patapsco*, 13 Wall. 329; *The Ludgate Hill*, 21 Fed. Rep. 431.

from supplies furnished at the owner's order or request,<sup>1</sup> or to an agent of the owner at a foreign port;<sup>2</sup> and the fact that the master is charterer or owner for the voyage does not prevent a lien arising although his contract will not bind the owner personally,<sup>3</sup> provided there was an intent by both parties to charge the ship.<sup>4</sup> Presumably, ordinary supplies furnished to an owner in person at a foreign port are on the personal credit of the owner,<sup>5</sup> and the same principle applies to charterers who are owners *pro hac vice*.<sup>6</sup>

<sup>1</sup> *The Mary*, 1 Paine, 671; *The Isaac May*, 21 Fed. Rep. 687; *The George T. Kemp*, 2 Low. 477; *Wilmer v. Smilax*, 2 Pet. Adm. 295; *The Guy*, 9 Wall. 758; *The Kalorama*, 10 Wall. 204; *The Lulu*, 10 Wall. 192; *The Grapeshot*, 9 Wall. 129. *Contra*, *The St. Jago de Cuba*, 9 Wh. 409.

<sup>2</sup> *The Patapsco*, 13 Wall. 329; *The India*, 16 Fed. Rep. 262; *The City of New York*, 3 Blatch. 187.

<sup>3</sup> *Thomas v. Osborn*, 19 How. 22; *Webb v. Pierce*, 1 Curtis, 104; *The New Champion*, 17 Fed. Rep. 816; *The Neversink*, 5 Blatch, 539; *The John Farron*, 14 Blatch. 24; *The India*, 16 Fed. Rep. 262.

<sup>4</sup> *Stephenson v. The Francis*, 21 Fed. Rep. 715; *The Custer*, 10 Wall. 204; *The James Guy*, 5 Blatch. 496; *s. c.*, 1 Ben. 112.

<sup>5</sup> *Thomas v. Osborn*, 19 How. 22; *The St. Jago de Cuba*, 9 Wheat. 409.

<sup>6</sup> "In dealing, not with the master, who in a foreign port represents, by the marine law the interests of all parties, and presumptively knows the needs of the ship, and its limitations, but with a known charterer only, not being an officer of the ship, and for

§ 51. While such liens are said to be *stricti juris*,<sup>1</sup> and the frequency and ease of communication with owners has increased, the tendency of the admiralty courts is to extend, rather than restrict, the enforcement of such liens.<sup>2</sup> These liens are secret, and there is no place where inquiry can be made, and their existence and extent ascertained, while the whole tendency of legislation has been "that the world should know the incumbrances on property."<sup>3</sup>

mere ordinary supplies, there is no sound legal or commercial reason why such dealings, not being a case of actual necessity or distress, should not be held subject to the precise limitations of the charterer's powers as specified by the charter, of which the material-man has, or is affected with knowledge," per Brown, D. J., in *Neill v. The Francis*, 21 Fed. Rep. 921; see Curtis, J., in *Thomas v. Osborn*, 19 How. at p. 28.

<sup>1</sup> *Pratt v. Reed*, 19 How. 359; *The Yankee Blade*, *ibid.* 82; *People's Ferry Co. v. Beers*, 20 *ibid.* 393.

<sup>2</sup> *The Grapeshot*, 9 Wall. 129; *The Kalorama*, 10 *ibid.* 204.

<sup>3</sup> Per Sprague, J., in *The Admiral*, 18 Law. Rep. 91.

The maritime lien as extended by the courts becomes a hindrance to investments in shipping, as to which there is no security to the purchaser except the vendor's warranty of title. The want of necessity for this lien in most cases, since the telegraph has made communication easy with owners in all parts of the world, has not yet produced any modification of the views of the admiralty courts in enforcing such maritime liens as a benefit to commerce. Their tendency is to enlarge rather than restrict the circumstances under which the lien will arise, since the case of *Pratt v. Reed*, 19 How. 359, and

In *Pratt v. Reed*<sup>1</sup> it was pointed out that these maritime liens were increasing in the coasting and lake trade, and, as they were tacit and secret, were not to be encouraged, but should be strictly limited to the necessities of commerce; and it was held that there must be shown not only that a necessity for the supplies, but also a necessity for the credit existed to maintain the lien. The same circumstances were said to be necessary to create an ordinary lien for supplies as would justify a loan on bottomry. That was a case of supplies furnished to a vessel engaged in interstate commerce, and the same rule was applied to supplies to a master for a vessel in the foreign trade.<sup>2</sup>

But the authority of these cases is overruled as to the necessity for showing a credit given to the master; and the rule now is, that the necessity for such supplies being shown, a presumption will

*Thomas v. Osborn*, 19 How. 22, which put the duty of the lender on inquiry for its necessity and the power of the master to hypothecate upon the same plane as that of the lender on bottomry, were overruled. The existence of such a lien is difficult of detection even by a purchaser acquainted with the nature of the liens which incumber vessel property; and the line of demarcation where the master's power begins and ends is often the crossing of a river. See opinion of Nelson, J., in *The Neversink*, 5 Blatch. 539.

<sup>1</sup> 19 How. 359, said to have been rightly decided, but the reasons disapproved in *The Grapeshot*, 9 Wall. 129.

<sup>2</sup> *Thomas v. Osborn*, 19 How. 22.

arise of the necessity for giving a credit at least to the master.<sup>1</sup>

The doctrines on the subject of maritime hypothecation are stated by the Supreme Court to be:<sup>2</sup> 1st. Liens for repairs and supplies, whether implied or express, can be enforced in admiralty only upon proof made by the creditor that the repairs or supplies were necessary, or believed, upon due inquiry and creditable representation, to be necessary. 2d. Where proof is made of the necessity for repairs or supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a presumption will arise, conclusive in the absence of evidence to the contrary, of necessity for credit. 3d. Necessity for repairs or supplies is proved, where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of ordering them on the security of the ship. 4th. The ordering by the master of supplies or repairs, upon the credit of the ship, is sufficient proof of such necessity to support an implied hypothecation in favor of the material-man, or of the ordinary lender of money to meet the wants of the

<sup>1</sup> *The Grapeshot*, 9 Wall. 129; *The Lulu*, 10 *ibid.* 192; *The Kalorama*, 10 *ibid.* 204.

<sup>2</sup> *The Grapeshot*, 9 Wall. at 141.

ship, who acts in good faith. 5th. To support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required.<sup>1</sup> And if the fact of necessity be left unproved, evidence is also required of due inquiry and of reasonable grounds of belief that the necessity was real and urgent.<sup>2</sup>

A distinction is drawn in these rules between tacit and express hypothecation. In the former the order for supplies and repairs by the master is proof of the vessel's necessity, while the lender on bottomry is bound to show actual necessity, or, what is equivalent as to him, an inquiry, and reasonable grounds for believing such necessity to exist. In either case, on such necessity being shown, or believed to exist, the presumption for a necessity for a credit to the ship arises.<sup>3</sup>

<sup>1</sup> *The Virgin*, 8 Pet. at 554; *The Gaetano and Maria*, L. R. 7 P. D. 137.

<sup>2</sup> *The Julia Blake*, 107 U. S. 418.

<sup>3</sup> *The Virgin*, 8 Pet. at 554; *The Aurora*, 1 Wh. 96; *The Fortitude*, 3 Sumner, 228. By the English law the master has authority to bind the owner for repairs and necessities; but he cannot hypothecate the vessel except upon the condition that the lender shall bear the risk of the voyage, so that the bond is at his risk. *Stainbank v. Fenning*, 11 C. B. 51, *Stainbank v. Shepard*, 13 C. B. (76 E. C. L. R.) 418. The master's right to pledge the profits for advances is denied. *Foard's Merchant Shipping*, 218; *Willis v. Palmer*, 29 L. J. (C. P.) 194:



The ground upon which the ordering of supplies by the master is made sufficient proof as to the ordinary lender of money, while a stricter rule is applied to the lender on bottomry, is stated to arise out of the necessity of the case. In hypothecations by bottomry which partake largely of the nature of hazard at extraordinary rates of interest, where the owner cannot be consulted, and which are agreed upon by the master and the lender under circumstances favorable to collusion and fraud, the lender is held to reasonable diligence in inquiring as to the existence of the fact of distress and the necessity for such repairs, which alone will warrant such transactions. The same reason, however, would appear to exist in the case of tacit hypothecation for supplies which binds the owner personally as well as the vessel.

In the case of ordinary supplies there appears to be no duty on the part of the master to consult the owners, if possible, as required in bottomry<sup>1</sup> and in contracts in the nature of salvage;<sup>2</sup> while consultation in case of the ordinary supplies for a vessel's necessities may not be requisite, yet wherever large and extensive repairs are necessary, it would not be unreasonable to require, in the coasting trade

<sup>1</sup> *The Virgin*, 8 Peters, 538.

<sup>2</sup> *The C. M. Titus*, 11 Fed. Rep. 442.

of the United States where communication by telegraph exists, some consultation with the ship's husband as representative of the owners before complying with the directions of the master.<sup>1</sup>

§ 52. The extension of this lien, under the decisions of the admiralty courts, has been to a class of vessels not originally considered as coming within the subject of admiralty jurisdiction, such as canal barges<sup>2</sup> and scows for carrying ballast,<sup>3</sup> and the tendency is to extend it to services not of a maritime nature, and to all torts and contracts originating on canals between vessels in the interstate trade.<sup>4</sup> Services and supplies to a floating elevator in the harbor of New York;<sup>5</sup> to a steam dredge;<sup>6</sup> to a pile driver;<sup>7</sup> to the restaurant of

<sup>1</sup> See *The Two Marys*, 10 Fed. Rep. 919, as to the power of part owners to bind each other for repairs.

<sup>2</sup> *The General Cass*, 1 Brown, 334; *The Kate Tremaine*, 5 Ben. 60; *Ex parte Easton*, 95 U. S. 68.

<sup>3</sup> *Endner v. Greco*, 3 Fed. Rep. 411; *The Alabama*, 22 *ibid.* 449.

<sup>4</sup> *Malony v. The City of Milwaukee*, 1 Fed. Rep. 611; *The E. M. McChesney*, 15 Blatch. 183; *The Avon*, 1 Brown, 170; *McCausland v. The Delaware*, 3 Fed. Rep. 878.

<sup>5</sup> *The Hezekiah Baldwin*, 8 Benedict, 556; *Endner v. Greco*, 3 Fed. Rep. 411.

<sup>6</sup> *The Alabama*, 19 Fed. Rep. 544.

<sup>7</sup> *Kearney v. A Pile Driver*, 3 Fed. Rep. 246.

a boat, plying between New York and Long Branch;<sup>1</sup> and to liquors furnished for the bar of a vessel employed in daily trips on the bay of New York, have been held to create maritime liens;<sup>2</sup> while a floating dock is held not to be the subject of a maritime lien;<sup>3</sup> nor is a dismantled steamboat not used in commerce.<sup>4</sup> Services to a floating raft<sup>5</sup> do not create a lien, and coal barges of such a character as could not be used except for a single voyage are not the subjects of process *in rem*.<sup>6</sup>

<sup>1</sup> *The Plymouth Rock*, 13 Blatch. 505; *The Metropolis*, 9 Ben. 83.

<sup>2</sup> *The Long Branch*, 9 Ben. 89.

<sup>3</sup> *The Salvor Wrecking Co. v. The Section Dock Co.*, 3 Cent. Law J. 640; *Cope v. The Vallette Dry Dock*, 10 Fed. Rep. 142.

<sup>4</sup> *The Hendrick Hudson*, 3 Ben. 419.

<sup>5</sup> *Raft of Cypress Logs*, 1 Flippin, 543; *Gastrel v. A Cypress Raft*, 2 Woods, 213. *Contra*, *Muntz v. A Raft of Timber*, 15 Fed. Rep. 557.

<sup>6</sup> *Jones v. The Coal Barges*, 3 Wall. Jr. 53; see, also, *Thackarey v. The Farmer of Salem*, 1 Gilpin, 524. The reader is referred to an article by Theodore M. Etting on Maritime Liens, 21 Am. Law Reg. (N. S.), pp. 1, 81, 145; and, also, to a note to *The De Smet*, 10 Fed. Rep. 483, by Orlando F. Bump.

There is the diversity in the decisions on these and other subjects which might be expected, while the limit of appeal to the Supreme Court confines the review of cases in admiralty to comparatively few. As to the diversity of decisions in the different circuits on the same subjects, see *The City of Tawas*, 3 Fed. Rep. 170; *The De Smet*, 10 Fed. Rep. 483; *The Manhasset*, 18 Fed.

§ 53. The tacit hypothecation or lien for supplies at a domestic port can only be enforced

Rep. 918; *The Hercules*, 20 Fed. Rep. 205; *The Pennsylvania*, 15 Fed. Rep. 814.

In *The Hardy*, 1 Dillon, 460, a libel *in rem* was maintained under a contract by which the master, in consideration of freights to be earned, agreed to carry for libellants certain goods, to collect from the consignee the freight money, and all charges, advances, insurance on goods, together with the price thereof. Such a contract was held to be within the scope of the master's power, and binding upon the vessel in favor of a shipper, who had no knowledge that the boat was chartered to run for other parties. On the other hand, when a charter party contains stipulations merely of a personal character, having no relation to a maritime service in the safe carrying and delivery of the cargo, courts of admiralty have no jurisdiction to afford relief for a breach of such part of the contract. *The Alberti v. The Virginia*, 2 Paine, 115. The case of *The Hardy* is not disapproved in *The New Hampshire*, 21 Fed. Rep. 924, and is an extension of the power of the master to hypothecate the vessel for contracts not necessarily within the ordinary scope of his duties. It may, in a certain class of trading vessels, be a part of the duty of the master, and within his authority, to collect the proceeds of cargo, but usually it is the duty of the consignees, or supercargo, and when the master acts in the latter capacity he would appear to be the agent of the shippers. *Williams v. Nichols*, 13 Wend. 58. The necessity of a maritime lien does not appear, even if his agency extends to bind the owners in such matters. The owners may hold the master out to the world as having such authority, but, unless they do so, they are not bound by his acts as their agent, unless when acting within the usual scope of the authority arising from his position as master.

by proceedings *in rem* in the admiralty courts, although created by the statute of a state and not by the maritime law;<sup>1</sup> as the courts of the state which create the lien are forbidden the exercise of any process to enforce it by proceedings *in rem* in maritime subjects.<sup>2</sup> But in enforcing such liens the provisions of the statute must be strictly complied with.<sup>3</sup> The limitation of a state statute runs, although the vessel was in the hands of a receiver and could not be attached.<sup>4</sup> And where congress establishes a lien by express statute against a ship for a violation of the revenue laws of the United States, the lien may be enforced in admiralty by a proceeding *in rem* against the ship for a recovery of the penalty.<sup>6</sup>

The Supreme Court, by the 12th admiralty rule,

*Suarez v. The George Washington*, 1 Woods, 96; *Smith v. The Royal George*, 1 Woods, 290; see opinion in *The Ole Oleson*, 20 Fed. Rep. 384; *The Mary*, 1 Paine, 671.

<sup>1</sup> *The General Smith*, 4 Wh. 438; *Peyroux v. Howard*, 7 Peters, 324; *The St. Lawrence*, 1 Black. 522; *The Lottawana*, 21 Wall. 558; *The Red Wing*, 14 Fed. Rep. 869.

<sup>2</sup> *The Belfast*, 7 Wall. 624; *Stewart v. The Potomac Ferry Co.*, 12 Fed. Rep. 296; *Terrell v. The B. F. Woolsey*, 4 Fed. Rep. 552.

<sup>3</sup> *The Edith*, 94 U. S. 518; *The Mississippi*, 6 Fed. Rep. 543; *The Ann*, 8 *ibid.* 923; *The Red Wing*, 14 *ibid.* 869; *The Guiding Star*, 18 Fed. Rep. 263; *The Lottawana*, 21 Wall. 558.

<sup>4</sup> *The Red Wing*, 14 Fed. Rep. 869.

<sup>6</sup> *U. S. v. The Missouri*, 9 Blatch. 433.

adopted in 1844,<sup>1</sup> directed that "the like proceeding *in rem* shall apply to cases of domestic ships, where by the local law a lien is given to material-men for supplies, repairs, or other necessities."

These rules of practice are promulgated in pursuance of the act of 23 August, 1845.<sup>2</sup> While process against the vessel was denied in the General Smith,<sup>3</sup> because the law of Maryland gave no lien or priority, it was allowed and supported in the case of *Peyroux v. Howard*,<sup>4</sup> upon the ground that the party had a lien by the law of Louisiana. "Yet, certainly," says Chief Justice Taney, "the court never supposed that the admiralty jurisdiction was broader in Louisiana than in Maryland."<sup>5</sup>

The proceedings *in rem* given under the 12th admiralty rule of 1844, where none was given by the maritime law, it is said, were found upon experience to be inapplicable to our mixed form of government, and it was repealed at December Term, 1858, by a new 12th Rule,<sup>6</sup> which went into effect on the 1st of May, 1859, in the following words: "In all suits by material-men for supplies or repairs, or other necessities, for a foreign ship, or for a ship

<sup>1</sup> 3 How. vi.

<sup>2</sup> Rev. Stat. § 917; *The St. Lawrence*, 1 Black, 522.

<sup>3</sup> 4 Wheat. 438.

<sup>4</sup> 7 Peters, 324.

<sup>5</sup> *The St. Lawrence*, 1 Black, at 529.

<sup>6</sup> 21 How. iv.

in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. And the like proceeding *in personam*, but not *in rem*, shall apply to cases of domestic ships, for supplies, repairs, or other necessities.”

In the case of *The St. Lawrence*,<sup>1</sup> the new rule was held not to apply to causes commenced before it went into effect, and a lien given by state law was adjudicated under the jurisdiction obtained while the rule of 1844 was in force, after it had been repealed by the rule of 1858.

A new 12th Rule was adopted in May, 1872, in the following words: “In all suits by materialmen for supplies, or repairs, or other necessities, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*.” The wording of this last rule is in some respects ambiguous, and would seem to imply a right to proceed *in rem*, in all cases of repairs or supplies, including that of domestic vessels; but it is to be construed, in accordance with the decisions, that the general maritime law gives no lien for supplies to a vessel at her home port; and in reference to its meaning, the words of the Supreme Court are distinct and unambiguous: “As to the recent

<sup>1</sup> 1 Black, 522.

change in the admiralty rule referred to, it is sufficient to say that, it was simply intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law, and not to create any new lien which, of course, this court could not do in any event, since a lien is a right of property, and not a mere matter of procedure."<sup>1</sup> So explained, the 12th Rule of 1872 places the jurisdiction of the admiralty *in rem* upon a clear footing, and removes all ambiguity as to the right to process *in rem* to enforce statutory liens in the admiralty.

In the promulgation of the previous rules, the Supreme Court treated the right to process *in rem*, as a question of practice or procedure, which the court could allow or modify in its discretion under the act of congress. The right of the Supreme Court by its rules of practice to refuse the allowance of process *in rem* by the admiralty courts when given by law, is sustained by authority as high as that of Chief Justice Taney,<sup>2</sup> but is not entirely satisfactory when the character of the process *in rem* is considered.<sup>3</sup> The maritime lien is a right of

<sup>1</sup> The Lottawana, 21 Wall. 558.

<sup>2</sup> The St. Lawrence, 1 Black, 522.

<sup>3</sup> See article "Admiralty Rule 12," 7 Am. L. Rev. at p. 7: "We have said that this rule undertook a piece of judicial legislation. It



property which the court cannot by its rules of practice or procedure create nor efface.<sup>1</sup> The right of the court to regulate its process in proceedings by attachment of a vessel, or of personal property of a respondent, and by arrest of the person, is entirely different from that in refusing or allowing the process *in rem*, as such former rules affect the right, and not the remedy. The process *in rem*, although a remedy, is also a right, the refusal of which process obliterates the proprietary lien, because it is the only one capable of enforcing such a lien with its peculiar priorities.<sup>2</sup> "The lien and proceedings

is capable of but two constructions. It means to say, either that in the case of materials for a domestic ship there can be no admiralty lien; or, that if there can be one, it shall not be enforced in the admiralty courts of the United States. If the former is the meaning, the court undertook to lay down law in the abstract in the form of a rule. The existence or non-existence of an admiralty lien in a certain case, or in a class of cases, is purely matter of law. The Supreme Court cannot decide law except as incidental to the determination of a case in actual litigation before it. In other words, it is simply a court of law—a judicial tribunal. It cannot decree law in the abstract, or at the request of any person, or even department of government. It can only decide actual cases." See *The De Smet*, 10 Fed. Rep. at p. 486; and chap. i. § 15.

<sup>1</sup> *The Lottawana*, 21 Wall, 558; *Ward v. Chamberlain*, 2 Black, 430.

<sup>2</sup> Story on Bailments, § 607; *Stewart v. The Potomac Ferry Co.*, 12 Fed. Rep. 296.

*in rem* are, therefore, correlative—where one exists the other can be taken, and not otherwise.”<sup>1</sup> An alteration of remedial process is not a violation of a contract, while a denial of all redress is.<sup>2</sup> And in the same manner the enforcement of a lien not given by the maritime law by proceedings in admiralty, is in effect a creation of a right of property by judicial construction, yet libels have been sustained for claims given by state statute, where the statutes contain no provision for a lien.<sup>3</sup> And in the absence of review by the Supreme Court, the tendency of the District and Circuit Courts of the United States is to extend the application of process *in rem*; thereby extending and even creating the secret liens which are said, in the *Lottawana*,<sup>4</sup> not to be in accordance with the spirit of our commercial usages, and, by a very able judge,<sup>5</sup> to be against the tendency of modern legislation.

§ 54. A diversity in adjudications exists as to

<sup>1</sup> Per Field, J., in *The Rock Island Bridge*, 6 Wall. 213.

<sup>2</sup> See dissenting opinion of Taney, C. J., in *Taylor v. Carryl*, 20 How. at p. 603, where a denial of the remedy is treated as a denial of the lien.

<sup>3</sup> *The William Law*, 14 Fed. Rep. 792; *The California*, 1 Sawyer, 463; *The Glenearne*, 7 Fed. Rep. 604; *The Clymene*, 9 Fed. Rep. 164; affirmed, 12 Fed. Rep. 346.

<sup>4</sup> 21 Wall. 558.

<sup>5</sup> Sprague, J., in *The Admiral*, 18 Law Rep. 91.

whether claims for statutory pilotage, arising from a tender and refusal of pilotage service, by virtue of the state laws governing pilotage, confer a lien. The District Court of Massachusetts, in *The Robert J. Mercer*,<sup>1</sup> refused to allow a lien where none was created by the statute, and subsequently allowed the lien in the admiralty where the state statute as amended gave one.<sup>2</sup> The question was raised but not decided in *Ex parte Hagar*,<sup>3</sup> as the question of jurisdiction did not arise in the Supreme Court. All pilotage laws are of port concern,<sup>4</sup> and it would seem that the right to a lien must be derived from the statutes which regulate pilotage.<sup>5</sup> The later cases, however, sustain the lien independently of the words of the statute.<sup>6</sup>

The admiralty has jurisdiction to enforce a common law lien by possession arising out of maritime services against domestic vessels, and to enforce it

<sup>1</sup> 1 Sprague, 284.

<sup>2</sup> *The America*, 1 Low. 176.

<sup>3</sup> 104 U. S. 520.

<sup>4</sup> Wharton's Comm. on Am. Law. § 424; *Cooley v. Board of Wardens*, 12 How. 299; *Wilson v. McNamee*, 102 U. S. 572.

<sup>5</sup> *The Sylvan Glen*, 9 Fed. Rep. 835.

<sup>6</sup> *The George S. Wright*, 1 Dedy, 591; *The California*, 1 Sawyer, 468; *The William Law*, 14 Fed. Rep. 792; *The Clymene*, 12 Fed. Rep. 346; *Steamship Co. v. Joliffe*, 2 Wall. 450; In *Ex parte McNeil*, 13 Wall. 236, the action was *in personam* by foreign attachment, and the question of lien did not arise.

by a sale.<sup>1</sup> But a lien growing out of possession cannot be enforced after the possession has been parted with, as it is not a privilege.<sup>2</sup> Wharfage is a maritime contract, which in reference to a foreign vessel creates a lien enforceable in the admiralty;<sup>3</sup> and the lien given by the statutes of a state for wharfage against domestic vessels is enforceable in the same manner.<sup>4</sup>

§ 55. The vessel and her cargo are mutually bound to each other by reciprocal liens. By custom, says Cleirac, "the ship is bound to the merchandise, and the merchandise to the ship."<sup>5</sup> Usually the charter-party contains such a clause, binding the ship to the merchandise, and the merchandise to the ship, but the law merchant imposes that obligation, even if it be omitted.<sup>6</sup> It has been said that stipulations to vary the law merchant, arising on a contract by a bill of lading or charter-

<sup>1</sup> *The Marion*, 1 Story, 68; *The B. F. Woolsey*, 7 Fed. Rep. 108; *The Two Marys*, 10 Fed. Rep. 919.

<sup>2</sup> *Bags of Linseed*, 1 Black, 108; *The Bird of Paradise*, 5 Wall. 545; *The Kimball*, 3 Wall. 37.

<sup>3</sup> *Ex parte Easton*, 95 U. S. 68; explained in *The John M. Welch*, 18 Blatch. 54.

<sup>4</sup> *The Virginia Rulon*, 13 Blatch. 519.

<sup>5</sup> Story, J., in *The Volunteer*, 1 Sumner, 551.

<sup>6</sup> Abbott on Shipping, 462; Parsons on Contracts, 5th ed. 284; MacLachlan on Shipping, 353; *The Bird of Paradise*, 5 Wall. 545; *The Volunteer*, 1 Sumner, 551.

party, must be by express words inserted in the contract, signed by the parties.<sup>1</sup> But signing by the shipper is not necessary; an acceptance by the shipper, of a bill of lading containing an exemption of the carrier's ordinary liabilities, is generally held sufficient, and the necessity for the signature was not adverted to in the case of the *New Jersey S. Nav. Co. v. The Merchants' Bank*,<sup>2</sup> in which the carrier's right to limit his liability by notice in the bill of lading for the negligence of his servants is denied and overruled. Most of the American cases admit that carriers may restrict their general liability, except for negligence, by notice brought home to the knowledge of the owners of the goods before or at the time of delivery to the carrier, if assented to by the owner.<sup>3</sup> And unless the shipper discloses the fact that he is an agent, the carrier deals with him as principal.<sup>4</sup>

<sup>1</sup> *Brittan v. Barnaby*, 21 How. 527; *The Bird of Paradise*, 5 Wall. at 562.

<sup>2</sup> 6 How. 344.

<sup>3</sup> *Redfield on Carriers*, § 144. See Opinion of Isham, J., in *Kimball v. The Rut. & Bur. R. R. Co.*, 26 Vt. 247.

<sup>4</sup> *York Co. v. Central R. R.*, 3 Wall. 118. An unsigned notice on the back of the carrier's receipt, but referred to in the body, was considered not binding, as notice to the shipper in the case of *The R. R. Co. v. Mfg. Co.*, 16 Wall. 318, but this appears to have followed from a statute of Michigan, where the contract was made, and the company was incorporated.

The admiralty courts apply the rule of the federal courts, refusing to allow common carriers to claim exemption from liability for the negligence of the carrier's servants,<sup>1</sup> to navigation in ocean carriage of goods in ships<sup>2</sup> even where the law of the vessel's nationality allows the owner to stipulate for such exemption.<sup>3</sup> This has been applied to contracts by English vessels whose law allows owners to stipulate for an exemption from liability for the negligence of servants in the navigation of the vessel.<sup>4</sup>

It is held, however, that such a carrier can stipulate in case of loss that the measure of damages is the invoice value of the goods even where the loss arose from the defective equipment of the vessel,<sup>5</sup> but a limitation of liability to £100 was

<sup>1</sup> *R. R. Co. v. Lockwood*, 17 Wall. 357.

<sup>2</sup> *The Colon*, 9 Ben. 354; *The City of Norwich*, 3 Ben. 575; *The Saratoga*, 20 Fed. Rep. 869.

<sup>3</sup> *The Montana*, 17 Fed. Rep. 377; *Unnevehr v. The Hindoo*, 1 Fed. Rep. 627; see *the Titania*, 19 Fed. Rep. 101; *May v. The Powhatan*, 5 Fed. Rep. 375; see, however, *The Regulus*, 18 Fed. Rep. 380.

<sup>4</sup> *The Duero*, L. R. 2 A. & E. 393; *Peninsular & Oriental St. N. Co. v. Shand*, 3 Moore P. C. C. (N. S.) 272; *Steel v. The State Line S. S. Co.*, L. R., 3 Appeal Cases, 72; *The Titania*, 19 Fed. Rep. 101.

<sup>5</sup> *The Hadji*, 18 Fed. Rep. 459; and cases there cited; see, also, *Victor v. The International Nav. Co.*, 45 N. Y. 129.

held to be inconsistent with contracts of carriers.<sup>1</sup> These cases are in accordance with the principle that parties can agree upon a measure of damages in case of loss as in demurrage by reason of delay, but it must be a substantial one, and not merely an arbitrary sum in the nature of a penalty for neglect.

Whether general ships are common carriers in every sense is doubtful. The vessel cannot carry more than her capacity, and is therefore not bound to carry everything that offers, as in the case of carriers by land, nor has it ever been held that a ship is bound to carry for every shipper at the same rate of freight as other common carriers are.<sup>2</sup>

A carrier by water cannot protect himself against the implied warrant of sea-worthiness for reasons of public policy not connected with his public

<sup>1</sup> *Unnevehr v. The Hindoo*, 1 Fed. Rep. 627.

<sup>2</sup> The reason for restricting the carrier's right to exemption from liability for negligence, only applies to such public carriers as are bound to accept and carry for all persons; who engage in a public employment; whose business of carrying must be habitual, not casual. Such a business must be general and for all people independently. He must assume to be the servant of the public; he must undertake for all people. *Fish v. Chapman*, 2 Kelly (Ga.), 349, referred to as "a powerful business-like judgment," applying the principle of law to the business of the country in *Nugent v. Smith*, L. R. 1 C. P. D. 19.

employment,<sup>1</sup> and the law itself limits the personal liability of owners as insurers to an extent not allowed to the carrier by land or the inland carrier by water.<sup>2</sup>

The reason why a common carrier cannot limit his liability by express terms does not arise from his liability as an insurer, but from his assuming a public employment. Although the vessel's liability as an insurer for cargo may be the same as that of a common carrier by land,<sup>3</sup> every ship-owner is not a common carrier in the sense that he follows such an employment as compels him to carry for every one indiscriminately, or on equal terms, and there would seem to be no reason why such a carrier should not by express words, brought home to the charterer or shipper, limit his liability as an insurer for a cargo he is not bound to accept, except in so far as it shall conflict with the implied warranty of sea-worthiness.<sup>4</sup>

<sup>1</sup> *The Regulus*, 18 Fed. Rep. 380 ; *Lyon v. Wells*, 5 East, 428 ; *Steel v. The State Line S. S. Co.*, L. R. 3 App. Cas. 72.

<sup>2</sup> Rev. Stat. §§ 4282-9.

<sup>3</sup> *Nugent v. Smith*, L. R. 1 C. P. D. 19 ; see *Cockburn, C. J.*, in *s. c.* L. R. 1 C. P. D. 423.

<sup>4</sup> *The Regulus*, 18 Fed. Rep. 380 ; *Nugent v. Smith*, L. R. 1 C. P. D. 423.

A ship is a common carrier when exercising a public employment, as in the case of "*The Lexington*," *The New Jersey St. Nav. Co.*



§ 56. As against the cargo, the right of a common carrier, by the law merchant, to retain goods

*v. The Merchants' Bank*, 6 How. 344 ; it is used as a vehicle by persons acting and holding themselves out to the world as common carriers. *Hastings v. Pepper*, 11 Pick. 41 ; *Nugent v. Smith*, L. R. 1 C. P. D. 423. And a general ship which offers to carry cargo for every one may be a common carrier *pro hac vice*. *Pope v. Nickerson*, 3 Story, 465 ; *The Saratoga*, 20 Fed. Rep. 869. But every contract of carriage by water has not the incidents of such an employment. See *Aymar v. Astor*, 6 Cowen, 266 ; *Sumner v. Caswell*, 20 Fed. Rep. 249. Cockburn, C. J., in *Nugent v. Smith*, L. R. 1 C. P. D. 423, doubts the judgment in *The Liver Alkali Co. v. Johnson*, L. R. 9 Exch. 338. Brett, J., in the latter case, does not treat such a vessel as a common carrier, but holds its liability to be the same. Mr. Parsons, in his work on *The Maritime Law*, ch. 7, § 5, points out the impossibility of applying the rules, governing the relations of common carriers, to all carriers by water. In a note he gives citations of authorities which show that the term common carrier is applied indiscriminately to all vessels, whether carrying on the ocean or inland, or running in regular lines or in transient employment. He admits the want of precision in the language by judges of the highest authority. These cases determine only that the liability of carriers by water is the same as that of common carriers by land in respect that they are insurers against everything except the act of God and the public enemy. Brett, J., in *Nugent v. Smith*, L. R. 1 C. P. D. 19, points out that the carrier's liability is not to be derived from the custom of the realm, but is independent of the question whether the vessel was a common carrier or not. The case was reversed on the ground that a common carrier is not liable for loss occa-

as an indemnity for the price of carrying is everywhere acknowledged as a principle of the law of bailment. The admiralty will enforce this lien against the cargo, but not as a privileged claim of the civil law, which will follow it in the hands of the owner after possession is parted with.<sup>1</sup> And by the American decisions in case of trans-shipment, where the master can only forward the goods at an increased rate of freight above that stipulated in the bill of lading, the goods are chargeable with the cost of trans-shipment and of extra freight.<sup>2</sup>

The enforcement of the carrier's possessory right of lien, under the admiralty system, may work different results from that which would follow its enforcement at common law,<sup>3</sup> or in equity; but it is essentially like the common law lien, and not a

sioned by effects of storm which could not be guarded against by ordinary skill and prudence. L. R. 1 C. P. D. 423.

Until it is decided that a ship must carry for all indiscriminately to the extent of its capacity on equal terms it cannot be said to be decided that a ship is a common carrier. The master and owners of a general ship were held not to be common carriers in *Aymar v. Astor*, 6 Cowen, 266; *contra*, *The Saratoga*, 20 Fed. Rep. 869.

<sup>1</sup> *Bags of Linseed*, 1 Black, 108; *The Eddy*, 5 Wall. 481.

<sup>2</sup> *Thwing v. Wash. Ins. Co.*, 10 Gray, 443; *Lamont v. Lord*, 52 Maine, 365; *Hugg v. Augusta Ins. Co.*, 7 How. 595; *Mumford v. Commercial Ins. Co.*, 5 Johns. 262.

<sup>3</sup> *Stewart v. The Potomac Ferry Co.*, 12 Fed. Rep. 296.

privilege in this respect, that it is lost by delivery of possession.<sup>1</sup>

The contract of affreightment is with the shipper, whether by charter party or otherwise, but acceptance by a consignee, although not the owner, raises an implied contract on his part to pay the stipulated freight, the consideration of which is the surrender of the carrier's lien.<sup>2</sup> The shipper is primarily liable on the contract of affreightment, and the liability of the consignee arises from his acceptance of the goods.<sup>3</sup> It is held, in one case,

<sup>1</sup> *Bags of Linseed*, 1 Black, 108; *The Bird of Paradise*, 5 Wall. 545; *The Kimball*, 3 Wall. 37.

<sup>2</sup> *Lamont v. Lord*, 52 Maine, 365; *Blanchard v. Page*, 8 Gray, 281; *Wooster v. Tarr*, 8 Allen, 270. This does not hold as to a claim for general average. *The Sabine*, 101 U. S. 384.

<sup>3</sup> The relation of a carrier to the cargo is such that the master cannot deny the title of the shipper, any more than the tenant can refuse to recognize that of his landlord (*The Idaho*, 11 Blatch. 218; *Story on Bailments*, § 582; *Angell on Carriers*, § 335), although a delivery by such a carrier to the true owner, if dispossessed by fraud, would be a good defence to an action by the shipper and those claiming under him. *Bates v. Stanton*, 1 Duer, at p. 85; *Sheridan v. The New Quay Co.*, 4 C. B. (N. S.) 618. A person claiming by a transfer of a bill of lading from the shipper, was allowed to recover damages by an action *in rem* against the ship, arising from a fall in price occurring between the date of stoppage order to the master and the time when the stoppage order was withdrawn and delivery tendered to the holder of the bill of lading. *Schmidt v. The Pennsylvania*, 9 W. N. C. (Pa.) 351, affirm-

where the freight was made payable to another person than the master, that if the carrier delivers

ing s. c. 7 W. N. C. (Pa.) 100. Dr. Lushington, in the case of the *Tigress* (Br. & Lush. at p. 45) held otherwise, and that the right to stop in transitu means not only to countermand delivery to the vendee but to order delivery to the vendor. The refusal of the master to deliver upon demand to the shipper is sufficient evidence of a conversion. *Thompson v. Trail*, 6 B. & C. 36; *Litt v. Cowley*, 7 Taunt. 169. As the indorsement of a bill of lading does not imply that it is for value, and as it is the form by which the delivery of goods is directed to be made to the shipper's agent as well as to vendee, the production of such an indorsed bill of lading would not of itself show any circumstances under which the right of stoppage had been lost (*Dracachi v. The Anglo-Egyptian Nav. Co.*, L. R. 3 C. P. 190); and as the contract of carriage is with the shipper, the master is bailee of the shipper only (*Rosenfield v. The Express Co.*, 1 Woods, 131), and the duty cannot well be thrown on the master of ascertaining whether the title to the goods had been parted with by his principal. The master may be affected by notice of fraud so as to make him responsible for delivering over stolen goods, or such as had been put in his charge by one who had fraudulently obtained them from the rightful owner. *The Idaho*, 11 Blatch. 218; see, also, 5 Ben. 280. The right, however, to assert a claim of title to goods by an action against the ship appears to be inconsistent with these principles. All this would be presented by an action of replevin, to which the court might properly remit him. The fact that the master may file a bill in equity to determine the conflicting rights of parties to goods in his charge is not inconsistent with these views (*Abbott on Ship*, 10th ed. p. 414), as a court of admiralty proceeds on equitable principles, and would suspend suit until the right of property was ascertained between

to the consignee without enforcing the lien on the goods, he thereby discharges the shipper from his personal liability.<sup>1</sup>

§ 57. The implied lien may be lost by stipulations in the charter party inconsistent with the retention of the goods as security, and in such case the lien is waived;<sup>2</sup> but it is presumed to exist, until such inconsistencies appear.<sup>3</sup> The parties may frame the contract of affreightment as they

the shipper and consignee. The liability of a ship for damages accruing in delivery (*The Thames*, 14 Wall. 98) does not imply that a carrier is responsible for damages which may arise by lawfully obeying the orders of the shipper. Judge Story says (*Story on Bailments*, § 580): "But an excuse, which in a practical sense is much more important and extensive, is that resulting from the right of the shipper to stop the goods in the possession of the carrier, while they are still in transit. This right is commonly called in the common law the right of stoppage *in transitu*. Whenever it arises and is properly exercised, the carrier is completely discharged from all further responsibility."

<sup>1</sup> *Thomas v. Snyder*, 39 Penna. St. 317. But that case was decided on the peculiar words inserted in the bill of lading; the rule is otherwise; the clause requiring payment of freight is inserted for the benefit of the carrier, and he may waive the lien and look to the consignor personally. *Christy v. Row*, 1 Taunton, 300.

<sup>2</sup> *Raymond v. Tyson*, 17 How. 53; *The Bird of Paradise*, 5 Wall. 545; *The Kimball*, 3 Wall. 37.

<sup>3</sup> *The Volunteer*, 1 Sumner, 551; *Drinkwater v. The Spartan*, 1 Ware, 149.

please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it, or they may so frame their contract as to exclude it altogether; but the presumptions are in favor of the lien, unless excluded by words wholly incompatible with the existence of such a right.<sup>1</sup>

Thus a stipulation that the freight should be payable within ten days after arrival at port of discharge, did not displace the lien where the delivery of the cargo might be rightfully postponed beyond the ten days after the return;<sup>2</sup> and a similar construction in a case of more doubtful meaning was put upon a stipulation that the freight should be payable on a round voyage in five days after the vessel's return to, and discharge in, the return port of the voyage.<sup>3</sup> Nor does the taking of a promissory note given by the charterers, and made payable at the time of the expected arrival of the ship in port, necessarily waive the lien.<sup>4</sup> So that

<sup>1</sup> *Raymond v. Tyson*, *ante*; *The Bird of Paradise*, *ante*; *The Kimball*, 3 Wallace, 37; *Gracie v. Palmer*, 8 Wheaton, 605. It would seem that the master has no right to waive an express lien for freight in favor of the charterers by signing bills of lading. *Gracie v. Palmer*, *ante*.

<sup>2</sup> *The Volunteer*, 1 Sumner, 551.

<sup>3</sup> *Certain Logs of Mahogany*, 2 Sumner, 589, affirmed in *The Kimball*, 3 Wall. 37.

<sup>4</sup> *The Kimball*, 3 Wall. 37.

a clause in the charter-party, binding the vessel and cargo for the performance of the respective covenants is sufficient to repel a doubt arising upon the construction of the stipulations, whether the lien for freight was intended to be waived.<sup>1</sup> But such a clause will not overrule a plain intention to extend the payment to a time beyond that of the delivery of the cargo.<sup>2</sup>

The insolvency of the charterers before the expiration of the credit does not restore the lien where it has been waived, but where an acceptance given for part of the freight fell due before the delivery of the cargo, the ship-owner, on the insolvency of the charterer, was remitted to his original lien as fully as if the acceptance had never been given.<sup>3</sup>

§ 58. Although the lien is lost by an unconditional delivery without demanding payment of freight,<sup>4</sup> a delivery to a consignee may be consistent

<sup>1</sup> Ibid.

<sup>2</sup> The true meaning of this clause is that the owner is to have a lien as far as possible. *Foster v. Colby*, 3 Hurlstone & Norman, 705; *Alsager v. St. Katherine Dock Co.*, 14 Meeson & Welsby, 794.

<sup>3</sup> *The Bird of Paradise*, 5 Wall. 545; *The Kimball*, 3 Wall. 37; *The St. Lawrence*, 1 Black, 522; *The Active*, Olcott, 286; *The Chusan*, 2 Story, 455.

<sup>4</sup> *Bags of Linseed*, 1 Black, 108.

with the retention of the lien, either by agreement of the parties or established local usage of the port.<sup>1</sup> The master to discharge his responsibility as a carrier must unload the cargo. He can store it for the preservation of his lien;<sup>2</sup> or under circumstances he can place it in the possession of the owner for the purpose of inspection, retaining his lien, which can be enforced against the cargo in the possession of the consignee,<sup>3</sup> although the rights of a purchaser without notice after delivery would be protected as in the case of a lien at common law.<sup>4</sup>

When the possession has been obtained by fraud, or where the payment of freight was intended to be contemporaneous with delivery, and payment was refused on delivery, the lien is not lost, and may be enforced after the master's possession has ceased.<sup>5</sup>

<sup>1</sup> *Bags of Linseed*, 1 Black, 108; *The Eddy*, 5 Wall. 481; *Wilcox v. 500 Tons of Coal*, 14 Fed. Rep. 49.

<sup>2</sup> *Richardson v. Goddard*, 23 How. 28.

<sup>3</sup> *Bags of Linseed*, 1 Black, 108; *The Eddy*, 5 Wall. 481.

<sup>4</sup> By the law of Germany the master's right of distraint for freight remains against the cargo in the consignee's hands for thirty days. Tenth Annual Conference of Association for the Reform and Codification of the Law of Nations, p. 63.

<sup>5</sup> *151 Tons of Coal*, 4 Blatch. 368.



§ 59. The rule is generally stated to be that there is no lien for dead freight or demurrage;<sup>1</sup> but it has not been followed in the American admiralty courts as to demurrage.

The decision of the Supreme Court of the United States, that there is no lien against the vessel for cargo not shipped, would seem to support the rule as to "dead freight," *i. e.*, freight which the ship was entitled to earn on cargo which was never carried.<sup>2</sup>

The admiralty courts now generally hold, that by the law merchant a lien exists against the cargo in favor of the ship-owner for detention of the ship, and which may be enforced against the consignee who accepts, although no such lien was stipulated in the bill of lading.<sup>3</sup>

<sup>1</sup> *Phillips v. Rodie*, 15 East, 547; *Foster v. Colby*, 3 Hurlstone & Norman, 705; *Maude & Pollock on Shipping*, 254; *Gladstone v. Berley*, 2 Merivale, 401; *Faith v. The East India Co.*, 4 B. & A. 630; *Foard's Merchant Shipping*, 313.

<sup>2</sup> *The Freeman v. Buckingham*, 18 Howard, 182.

<sup>3</sup> *The Hyperion's Cargo*, 2 Low. 93; *Smith v. Yellow Pine Lumber*, 2 Fed. Rep. 396; "*The Olive*," *Moody v. 500,000 Laths*, 2 Fed. Rep. 607; *Eleven Hundred Tons of Coal*, 12 Fed. Rep. 185; *Bertellote v. Cargo of Brimstone*, 3 Fed. Rep. 661; *Bjorkquist v. Certain Steel Rail Crop Ends*, 3 Fed. Rep. 717; *100 Tons of Coal*, 14 Fed. Rep. 878; *Stafford v. Watson*, 1 Biss. 437; *Winslow v. Bbls. of Salt (400)*, 1 Biss. 459; *Clayton v. Tons of Coal (410)*,

The lien, when created by express terms in a charter-party giving the ship-owners an absolute lien on the cargo for all freight, dead freight, and demurrage, is said in *Foster v. Colby*,<sup>1</sup> not to enlarge the lien for freight as generally understood, and to be inserted so as to include dead freight and demurrage within the operation of the provision. This statement is inconsistent with a lien implied by law. It is impossible to read the result of the cases for demurrage when given by express contract, such as those in which the undermost cargo, which was least accommodated in point of delivery, incurred liability for demurrage,<sup>2</sup> without regretting that a maritime lien should be held to exist, giving the right to detain for demurrage in the absence of stipulation, especially where there is no default on the part of the receiver of the goods. The subject was examined in *The Hyperion's Cargo*,<sup>3</sup> and the opinion, while it rejects the circumstance that the damages are unliquidated as a ground for refusing the lien in admiralty, supports the lien in the absence of stipulation, on the

20 Fed. Rep. 799; *Hawgood v. Tons of Coal* (1810), 21 Fed. Rep. 681.

<sup>1</sup> 3 Hurlstone & Norman, 705.

<sup>2</sup> *Leer v. Yates*, 3 Taunton, 387; *Randall v. Lynch*, 2 Campbell, 352.

<sup>3</sup> 2 Low. 98, affirmed in *Donaldson v. McDowell*, 1 Holmes, 290.

ground that the general law merchant gives a reciprocal privilege which appears "to extend to all claims which may arise on one side or the other, out of the contract of affreightment."

The existence of this implied lien or privilege on the cargo for demurrage, and the views of Judge Lowell, have lately been sustained in an elaborate opinion in a case of demurrage in the District Court for the Eastern District of Wisconsin.<sup>1</sup> If it is a privilege, and not a mere right of detention, then it will arise for detention at the port of loading as well as at the point of delivery and discharge, as the lien dates back to the period when it first attached,<sup>2</sup> and it has been so held;<sup>3</sup> and the consignee accepting cargo under such circumstances will become personally responsible for the defaults of the shipper, as well as his own,<sup>4</sup> and such a privilege, if given by the maritime law, will affect the negotiability of bills of lading as a basis for banking and exchange, as it would if attention was called to it by the terms of the bill of lading; while the rule at common law is that the

<sup>1</sup> *Hawgood v. Tons of Coal* (1810), 21 Fed. Rep. 681.

<sup>2</sup> *The Bold Buccleugh*, 7 Moo. P. C. C. 267.

<sup>3</sup> *Moody v. 500,000 Laths*, 2 Fed. Rep. 607; *Logs of Cedar* (268), 2 Low. 878.

<sup>4</sup> *Scaife v. Tobin*, 3 Barn. & Ad. 528; *Jesson v. Solly*, 4 Taunton, 52.

liability of the consignee for demurrage must arise from his own acts of detention, and not from that of the shipper.<sup>1</sup>

That demurrage may be claimed from the consignee without express contract for unreasonable detention by him,<sup>2</sup> is not inconsistent with the natural justice of the rule that a consignee, by accepting the cargo, shall not become personally liable for the defaults of others. An ordinary shipper, without notice, is not bound by the terms of a charter-party conferring a lien not given by law,<sup>3</sup> and where such a lien exists in favor of the ship-owner, neither the master nor the charterer has the right to divest it.<sup>4</sup> But it is manifestly not conducive to public policy that secret liens should accompany the cargo into other hands, as in the case of the ship itself.

The lien for demurrage has for these reasons been held in some cases to be possessory only, and not to be a privilege; and does not follow the cargo after the possession is parted with or charge the

<sup>1</sup> *Wordin v. Bemis*, 32 Conn. 268; *Cross v. Beard*, 26 N. Y. 85; *Gage v. Morse*, 12 Allen (Mass.), 410.

<sup>2</sup> *Fulton v. Blake*, 5 Biss. 371; *The M. S. Bacon v. The Erie and West. Trans. Co.*, 3 Fed. Rep. 344.

<sup>3</sup> *The Peer of the Realm*, 19 Fed. Rep. 216; *The Ibis*, 3 Woods, 28.

<sup>4</sup> *Gracie v. Palmer*, 8 Wh. 605.

consignee personally for its acceptance.<sup>1</sup> As bills of lading are quasi negotiable, the right to detain for demurrage occasioned by the fault of the shipper, if treated as a privilege, will, as against the assignee of a bill of lading, occasion inconvenience. The absence of the assertion of the existence of such a privilege in the decisions of the Supreme Court, and in the rules enacted to formulate the various procedures growing out of liens, is some authority for doubting its existence. Such a reason was given for doubting the existence of the maritime lien for supplies to domestic vessels in *The Lottawana*.<sup>2</sup>

No analogy is derived to support this lien from the decisions of that court; a right of action does not arise against a consignee from the acceptance of goods which the shipper might have detained for general average charges<sup>3</sup> nor for salvage,<sup>4</sup> and the master's right to detain cargo for freight is expressly declared not to be a privilege but a possessory lien like that at common law, which is lost by parting with the possession.<sup>5</sup>

A possessory lien for demurrage does not exist

<sup>1</sup> *Stafford v. Watson*, 1 Biss. 437; *Winslow v. Barrels of Salt* (400), 459.

<sup>2</sup> 21 Wall. 558.

<sup>3</sup> *Cutler v. Rae*, 7 How. 729.

<sup>4</sup> *The Sabine*, 101 U. S. 384.

<sup>5</sup> *Bags of Linseed*, 1 Black, 108; *The Bird of Paradise*, 5 Wall. 545.

in carriage by land, the right to detain is only for the freight.<sup>1</sup> The cases in which a consignee, not the owner of the goods, has been held liable to pay freight or demurrage, Baron Parke says, proceed on the ground that his acceptance of the goods in pursuance of a bill of lading whereby the shipper has expressly made the payment of the freight or demurrage a condition precedent to the delivery, is evidence of a contract to pay the stipulated demurrage.<sup>2</sup>

The difficulties in enforcing such a lien in different parts of the same cargo belonging to different owners when a general ship is chartered to parties who sublet,<sup>3</sup> make a rule of the commercial world, if adopted when the owner of the cargo was the hirer of the vessel, inapplicable to general ships, and more particularly inapplicable since the negotiability of bills of lading has made them the basis for banking and exchange. It would tacitly preclude the adoption by the court of a contract which, when it is attempted to be enforced according to its strict legal interpretation under bills of lading,

<sup>1</sup> Redfield on Carriers, § 327; *Crommelin v. The N. Y. & Harlem Railroad Co.*, 10 Bosw. 77. See, also, *Clendaniel v. Tuckerman*, 17 Barb. 184.

<sup>2</sup> *Scaife v. Tobin*, 3 Barn. & Ad. 523.

<sup>3</sup> *Rogers v. Hunter, M. & M.* 63; *Dobson v. Droop, M. & M.* 441.

is admitted by three chief justices of England to work the grossest injustice to the parties.<sup>1</sup>

§ 60. The lien of the owner of the cargo against the ship is a privilege, and is enforced as such with all the incidents of a purely maritime lien. It may be enforced in contracts of water carriage upon the high seas and upon the navigable waters of the United States, although the voyage is between two ports of the same state;<sup>2</sup> and the jurisdiction to enforce the lien is exclusive of the state courts, even when the lien is conferred by state law, since a state cannot in any way abridge or interfere with the rights and remedies given to the admiralty for the enforcement *in rem* of the lien against the vessel. It would appear, however, that the remedy against the cargo may be

<sup>1</sup> Maclachlan on Merchant Shipping, 497. In *Gronstadt v. Wit-hoff*, 15 Fed. Rep. at 272, Brown, D. J., in his opinion, shows the inapplicability of the principle of the cases to the consignees by a general ship: "It is unreasonable, therefore, to suppose and it is, in fact, incredible, that the parties to the numerous bills of lading on a general ship intend to make all the consignees responsible *in solido*, not merely for the delays of the vessel over which they have no control, but also for the defaults of each other in the removal of the several portions of the cargo, unless the words used in the bill of lading admit of no other construction."

<sup>2</sup> *The Belfast*, 7 Wall. 624; but not on the lakes under the act of congress; *Allen v. Newberry*, 21 How. 244.

enforced by the ordinary process to enforce a lien against the owner provided it is not *in rem*.

A possessory suit may be maintained by the owners of the cargo against the ship in the admiralty for non-delivery, and the cargo can be delivered to the owners on giving stipulations for the value to cover any charges against the same for freight or general average,<sup>1</sup> and no reason exists why the same process cannot be issued against the cargo itself, otherwise the redress of the owner of the cargo would be limited to the value of the ship, although the value of the cargo might exceed that of the ship.<sup>2</sup>

The lien of the cargo against the ship commences when the cargo is delivered to the master alongside the wharf, or in a lighter employed by the ship,<sup>3</sup> or on a barge owned by or employed by the owner of the steamer intended to be towed.<sup>4</sup>

<sup>1</sup> *The Bird of Paradise*, 5 Wall. 545 ; *The Eddy*, 5 Wall. 481.

<sup>2</sup> *Tons of Salt* (250), 5 Fed. Rep. 216 ; *Williams & Bruce*, "High Court of Admiralty," 193 ; *Wenberg v. A Cargo of Mineral Phosphate*, 15 Fed. Rep. 285 ; but the owner must be the legal owner, and a claim to the possession of the cargo founded on fraud where there has been no dispossession is not sustainable in the admiralty ; 528 *Pieces of Mahogany*, 2 Low. 323.

<sup>3</sup> "The Edwin," *Bulkley v. Naumkeag Steam Cotton Co.*, 24 How. 386.

<sup>4</sup> *The Keokuk*, 9 Wall. 517 ; *The Hermitage*, 4 Blatch. 474.



It does not require physical contact between the cargo and the ship to create the lien,<sup>1</sup> nor does the mere unlading of the merchandise on the wharf, or even in a wharf-house necessarily discharge the lien,<sup>2</sup> a constructive possession is sufficient to support it.

But a bill of lading signed before the goods are delivered to the master will not create the lien against the ship, although the master was the special owner of the voyage, and himself could not be heard to deny the validity of the bill of lading, as against a purchaser for value;<sup>3</sup> nor does the breach of a contract of affreightment, where the ship-owner never enters upon the contract, create a maritime lien.<sup>4</sup>

§ 61. The breach of every contract between the

<sup>1</sup> Ibid.

<sup>2</sup> *The Eddy*, 5 Wall. 481; *The Edwin*, 24 How. 386.

<sup>3</sup> *The Freeman v. Buckingham*, 18 How. 182.

<sup>4</sup> *The Yankee Blade (Vandewater v. Mills)*, 19 How. 82. See passage from 2 Boulay, *Paty Droit Com. et Mar.* 299, cited at page 90. "Hors ces deux cas (viz., default in delivery of the goods, or damages for deterioration) il n'y a pas de privilege à pretendre de la part du marchand chargeur; car si les dommages et intérêts n'ont lieu que pour refus de depart du navire, pour depart tardif ou parcipité, pour saisie du navire ou autrement il est evident que à cet egard la créance est simple et ordinaire, sans aucune sorte de privilege." See, also, Caumont, *Dictionary of Maritime Law*, p. 234, § 54; *The Asa Elbridge*, 8 Fed. Rep. 720.

ship-owner and the charterer will not create a maritime lien. The rule that the ship is bound to the cargo, and the cargo to the ship, does not imply that a lien is thereby created for the failure to enter upon a contract, or the non-performance of an executory contract.<sup>1</sup> And the failure to enter upon a contract of towage creates no lien,<sup>2</sup> although such a lien arises from the breach of the duty of the tug to its tow,<sup>3</sup> and is given against the ship for the services rendered by the tug to the ship. The refusal of the master to issue a bill of lading for goods shipped is a breach of the contract which can be enforced *in rem* against the vessel.<sup>4</sup>

§ 62. The lien arising from tort extends to all injuries committed on the high seas and on the navigable waters of the United States, and is extended by later decisions to collisions on canals, which are highways of the states uniting public navigable

<sup>1</sup> *The Keokuk*, 9 Wall. 517; *The General Sheridan*, 2 Ben. 294; *The William Fletcher*, 8 Ben. 587; see the opinion of Brown, D. J., in which the question is very fully examined, and the existence of the lien denied, in *Scott v. The Ira Chaffee*, 2 Fed. Rep. 401; *The Hermitage*, 4 Blatch. 474; *The City of Baton Rouge*, 19 Fed. Rep. 461.

<sup>2</sup> *The Prince Leopold*, 9 Fed. Rep. 333.

<sup>3</sup> *The Syracuse*, 6 Blatch. 2; *The Princeton*, 3 Blatch. 54.

<sup>4</sup> *The Peer of the Realm*, 19 Fed. Rep. 216; *The Ibis*, 3 Woods, 28; *The Ferreri*, 9 Fed. Rep. 468.

waters of the United States,<sup>1</sup> and the lien is enforced in contracts of affreightment on canals.<sup>2</sup> The extension of the maritime lien and jurisdiction by judicial interpretation applies all the incidents of maritime navigation to vessels employed on canals when engaged in interstate commerce. If canals are to be regarded as public waters of the United States, it must include jurisdiction in cases of salvage, general average, and contracts of affreightment, although the Supreme Court of the United States at one time said it is a matter of grave doubt, whether such rules apply to voyages on the lakes where the act of 1845 gives jurisdiction.<sup>3</sup>

<sup>1</sup> *Ex parte Boyer*, 109 U. S. 629; *The Oler*, 14 Am. L. Reg. (N. S.) 300; *The Avon*, 1 Brown, 170; *Malony v. The City of Milwaukee*, 1 Fed. Rep. 611; *The Delaware*, 3 Fed. Rep. 878; *The B. & C.*, 18 Fed. Rep. 543.

<sup>2</sup> *The E. M. McChesney*, 15 Blatch. 183.

<sup>3</sup> *The Eagle*, 8 Wall. at p. 23. See, also, *Moore v. The Am. Trans. Co.*, 24 How. at p. 36; and *Bondies v. Sherwood*, 22 How. 214. The maritime lien by collision and the jurisdiction of the admiralty to enforce it, was upheld in a collision upon the Illinois & Lake Michigan Canal, connecting the Illinois River with Lake Michigan, between two vessels engaged in the internal navigation of the state. *Ex parte Boyer*, 109 U. S. 629. The question whether the admiralty jurisdiction extended to such waters wholly within the body of a state, and which could not be used in the external commerce of the state, was expressly left undecided. The exercise of such jurisdiction by the admiralty may conflict with the right of the states to the complete control and regulation of their

§ 63. The question whether a cause of damage resulting in death on shipboard, gives rise to the

own artificial highways, as recognized in *The State Tax on Gross Receipts*, 15 Wall. 284, and *Gibbons v. Ogden*, 9 Wh. 1; explained more clearly and fully in *The R. R. Co. v. Maryland*, 21 Wall. 456; where the distinction is pointed out between external trade on the public navigable waters where "no franchise is needed to enable the navigator to use them," and that on the internal highways created by the states, which are highways of the states, and under the complete control of the state which creates them, canals being constructed under the road-making power of the state. The federal authority exercises its control over the navigable waters of the United States, but does not extend the benefits of the national system to the internal canal, while the state, through its corporation, is the conservator of the highway created by a canal, as the United States is of the public navigable rivers. *The Daniel Ball*, 10 Wall. 557; *R. R. Co. v. Maryland*, 21 Wall. 456. The English admiralty has taken jurisdiction in a collision between English vessels on the Great North Holland Canal, but sustained it on the words of the Admiralty Court Act of 1861, 24 Vict. c. 10. "The High Court of Admiralty shall have jurisdiction over any claim for damages done by any ship," *The Diana*, Lush. 539; and also to a collision on the Suez Canal, *The Guy Mannering*, L. R. 7 P. D. 132. The distinction between the necessity for the exercise of the admiralty jurisdiction over the international canals, and canals which are artificial highways of the states is obvious. The neutrality of the former canals as parts of the ocean they connect, must, however, be supported in the international law, to prevent the law of the local government of such canals attaching to vessels in transit. See article on the Suez Canal in *International Law*, 9 *Law Magazine and Review* (4 series), 117. See, also, article on *The Congo River*, *ibid.* 1.

maritime lien, has been generally adjudicated in favor of the existence of the lien, and the process to enforce the remedy for a wrong done or injury incurred by the death of a person may be either *in personam* or *in rem*.<sup>1</sup>

If the cause of action arose from the maritime law, the lien would of necessity exist.<sup>2</sup> Such actions when given by the state law, are, however, generally treated as maintainable only when not an encroachment upon the commercial power of congress under the commercial clause,<sup>3</sup> and it should follow, therefore, that they can only be enforced *in rem*, when a lien is given by the statute of the state.<sup>4</sup>

The same question has arisen in the English

<sup>1</sup> The *Towanda*, 34 Leg. Int. (Pa.) 394; The *E. B. Ward, Jr.*, 17 Fed. Rep. 456; The *Sea Gull*, Chase's Dec. 145; The *Highland Light*, Chase's Dec. 150; The *Clatsop Chief*, 8 Fed. Rep. 163; *Rush v. The Charles Morgan*, 18 Am. L. Reg. (N. S.) 624; The *David Reeves*, 5 Hughes, 89; The *Garland*, 5 Fed. Rep. 924; The *Manhasset*, 18 Fed. Rep. 918; *contra*, The *Sylvan Glen*, 9 Fed. Rep. 335.

<sup>2</sup> See article by R. C. McMurtrie in the 16 Am. Law Review, Feb. 1882, p. 128.

<sup>3</sup> *Sherlock v. Alling*, 93 U. S. 99; *Ins. Co. v. Brame*, 95 U. S. 754.

<sup>4</sup> The *General Smith*, 4 Wh. 438; The *Sylvan Glen*, 9 Fed. Rep. 335. The District Court of Virginia approves the rule in the *Sylvan Glen*, but did not follow it, as it was bound by decisions of the same court. The *Manhasset*, 18 Fed. Rep. 918.

admiralty, the admiralty sustaining the right of action to arise under the Lord Campbell act, and its jurisdiction under another statute prescribing the jurisdiction of the High Court of Admiralty.<sup>1</sup> The jurisdiction *in rem* of the admiralty was denied on prohibition in the Queen's Bench,<sup>2</sup> but was previously sustained in the Privy Council,<sup>3</sup> and also subsequently in the Court of Appeals by an equally divided court.<sup>4</sup>

§ 64. Secret liens affect the transmissibility of vessel property, and are therefore a hindrance to investments in shipping. The limit of time within which they will be enforced is necessarily a variable one; where other interests have not intervened they are extended almost indefinitely, as the statutes of limitation do not govern in the admiralty.<sup>5</sup>

<sup>1</sup> The *Guldfaxe*, L. R. 2 A. & E. 325; The *Sylph*, L. R. 2 A. & E. 24; The *Explorer*, L. R. 3 A. & E. 289; The *Beta*, L. R. 2 P. C. 447:

<sup>2</sup> *Smith v. Brown*, L. R. 6 Q. B. 729.

<sup>3</sup> *Beta*, L. & R. 2 P. C. 447.

<sup>4</sup> *Bramwell & Brett*, L. JJ., dissenting, The *Franconia*, L. R. 2 P. D. 163.

<sup>5</sup> The *Key City*, 14 Wall. 653; *Reed v. The Ins. Co.*, 95 U. S. 23; The *Utility*, 1 Bl. & H. 218; *Smith v. Sturgis*, 3 Ben. 330. In *Reed v. The Ins. Co.* the question was raised, but not decided, whether a contract could be enforced by a libel *in personam* in the admiralty which, if brought in a state court of concurrent jurisdiction, would be barred by the statutes of limitation of the

The distinction between the process *in rem* to enforce a claim against a vessel, at times free by her employment from judicial process, and an action *in personam* against the owners, would allow statutes of limitation to affect the latter and not the former. But in the admiralty procedure, the distinction is not observed.<sup>1</sup>

The statutes of limitation are, however, followed by analogy in actions *in personam* brought in the admiralty as in equity where no special equitable reasons exist against the application.<sup>2</sup>

§ 65. What is a "stale lien" cannot be stated with anything approaching to precision; a right of action *in personam* may exist which cannot be enforced *in rem*, because in the latter case the rights of *bona fide* purchasers may intervene; as against such a purchaser the suit should be brought as soon as an opportunity is presented.<sup>3</sup> But a purchaser who, at the time of the purchase, has information which should put him on inquiry

state governing the contract; see, also, *Brown v. Jones*, 2 Gall. 477; *Williard v. Dorr*, 3 Mason, 91.

<sup>1</sup> Probably the assertion that such procedures are not affected by legislation may have influenced the decision, as in *Atkins v. The Disintegrating Co.*, 18 Wall. 272, where the judiciary act is held not to apply to proceedings *in personam* in admiralty.

<sup>2</sup> *Scull v. Raymond*, 18 Fed. Rep. 547.

<sup>3</sup> 2 *Parsons' Maritime Law*, 663.

as to the existence of such liens against the vessel, cannot set up the failure of the master to institute proceedings against the vessel until after his title was acquired.<sup>1</sup> The result of the authorities is stated by Justice Miller, in the *Key City*<sup>2</sup> in the following propositions:—

“1. That while the courts of admiralty are not governed in such cases by any statute of limitation, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defence.

“2. That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case.

“3. That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defence will be held valid under shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued.”

As later maritime liens take precedence of those previously incurred, the inquiry is unimportant to

<sup>1</sup> The *Louie Dole*, 14 Fed. Rep. 862.

<sup>2</sup> 14 Wall. 653.



those furnishing supplies or looking to the vessel for indemnity for breach of contract or other redress for which the maritime lien is given. But as regards purchasers and mortgagees it is desirable that the duration of the secret lien which seriously injures the transmissibility of vessel property should be determined with more certainty than now exists.

Whether a claim will be considered stale in admiralty depends not so much upon lapse of time as upon change of circumstances affecting the rights and conditions of parties.<sup>1</sup>

In cases of collision, also, the loss of evidence by lapse of time requires a party to prosecute his claims with diligence; and, a party who fails to prosecute his claim for damages against a vessel or the owners destroys, in fact, the power of proving successfully a valid defence.<sup>2</sup>

But the delay which prevents the enforcement of a maritime lien is something more than mere lapse of time; there must be unreasonable neglect and delay operating to the prejudice of third parties.<sup>3</sup>

<sup>1</sup> *The Utility*, 1 Blatch. & How. 218; *Coburn v. Factors' and Traders' Ins. Co.*, 20 Fed. Rep. 644; *The Bristol*, *ibid.* 800.

<sup>2</sup> *The Admiral*, 18 Law Rep. 91; *Smith v. Sturgis*, 3 Ben. 330.

<sup>3</sup> *The Key City*, 14 Wallace, 653; *The Louisa*, 2 Woodbury & Minot, 48; *The Granite State*, 1 Sprague, 277; *The Utility*, 1 Blatch. & How. 218; *Sonderburg v. The Tow Boat Co.*, 3 Woods,

Where reasonable diligence is used the lien may be enforced against the vessel in whosoever possession it may have come;<sup>1</sup> and the vendee is remitted for redress to his rights against the vendor.<sup>2</sup>

But in the absence of an attempt to enforce the lien after opportunity to do so, it will be presumed to have been waived in favor of subsequent purchasers;<sup>3</sup> the same principle was applied to a lien by express hypothecation by bottomry.<sup>4</sup>

Although a change in the stockholders of a corporation who purchased stock in ignorance of the existence of the lien on the vessel, was referred to in one case,<sup>5</sup> as one of the reasons for refusing to enforce a lien arising out of collision against a vessel which after the occurrence had become the

146; *The Buckeye State*, 1 Newberry, 111; *Bryant v. The Lillie Mills*, 18 Law Rep. 494; *The Admiral*, 18 Law Rep. 91; *The General Jackson*, 17 Law Rep. 324.

<sup>1</sup> *The Europa*, Brown & Lush. 89; *The Bold Buccleugh*, 7 Moore P. C. Cases, 267.

<sup>2</sup> *Edwards v. The Stockton*, Crabbe, 580; *The Nymph*, Swabey, 86; *The Walkyrien*, 11 Blatch. 241.

<sup>3</sup> *The Utility*, 1 Bl. & How. 218.

<sup>4</sup> *Blaine v. The Charles Carter*, 4 Cranch, 228; see, also, *Williard v. Dorr*, 3 Mason, 91; *Stevens v. The Sandwich*, 1 Pet. Adm. 233, note; *Trump v. The Thomas*, Bee's Adm. 86; *The Mary*, 1 Paine, 180.

<sup>5</sup> *The Admiral*, 18 Law Rep. 91; the libel was filed twenty months after the collision.

property of a corporation; the Supreme Court of the United States<sup>1</sup> treated the consolidation of a corporation owning the vessel at the time of the occurrence, with another company, into a new company, as not being a sale of the vessel. The suit was brought three years and a half after the cause of action accrued. The circumstances of that case gave rise to a reasonable presumption that the loss would fall on the stockholders coming in through the company originally owning the vessel. But it is probable that the change in the ownership of the stock of corporations owning vessels will not be a reason for limiting the time within which liens can be enforced against such vessels whose ownership remains the same.<sup>2</sup> Such a change will not affect the vessel's right to a registry.<sup>3</sup>

In the case of the *Eliza Jane*,<sup>4</sup> supplies were furnished to a foreign vessel in Boston, in January, 1846, and in September, 1846. The vessel was in Boston in July of the same year, to the knowledge of the libellants, and was sold in October, 1846. The libel was sustained as to the supplies fur-

<sup>1</sup> *The Key City*, 14 Wall. 653.

<sup>2</sup> See *Coburn v. Factors' and Traders' Ins. Co.*, 20 Fed. Rep. 644.

<sup>3</sup> Rev. Stat. § 4137; *Queen v. Arnaud*, 9 A. & E. (N. S.) 806.

<sup>4</sup> 1 Sprague, 152.

nished in September; the failure of the libellants to enforce his lien for the supplies previous to July was held to be a bar to the enforcement of his lien against a purchaser of the vessel.

And a creditor who delayed presenting his claim against a fund arising from the sale of a vessel until distribution had been made to the claimant of the three-fifths, was only allowed to intervene in the remainder for two-fifths; by permitting distribution to be made, he had tacitly waived his lien as to the part distributed.<sup>1</sup>

The lien creditor is not bound to follow the vessel to a foreign jurisdiction to enforce his claim,<sup>2</sup> but if he has an opportunity of enforcing it on the return of the vessel to the port where the owner of the vessel resides,<sup>3</sup> the lien will be waived if he fails to enforce it, and the rights of purchasers intervene.<sup>4</sup> The filing of a libel without seizure of the vessel is not constructive notice of the lien

<sup>1</sup> *In re Wright*, 16 Fed. Rep. 482.

<sup>2</sup> *The Europa*, Brown & Lush. 89; *The Charles Amelia*, L. R. 2 A. & E. 330.

<sup>3</sup> *The Rebecca*, 1 Ware, 188; *The Hercules*, Brown's Adm. 560; *The Europa*, Brown & Lush. 89.

<sup>4</sup> *The Utility*, 1 Blatch. & How. 218; *The Robert Gaskin*, 9 Fed. Rep. 62; *The City of Tawas*, 3 Fed. Rep. 170; *The Morning Star*, 14 Fed. Rep. 866; *The Walkyrien*, 11 Blatch. 241; *The Lauretta*, 9 Fed. Rep. 622; *The Dubuque*, 2 Abb. 20.

to purchasers.<sup>1</sup> The limitation of the duration of a lien given by the statute of a state and not by the maritime law, is, however, enforced, as the right grows out of the statute, but only on compliance with its terms; as unlike laws limiting the right to sue within a given time, they cannot be waived by the parties, but are conditions precedent to the enforcement of the right of lien and are, therefore, strictly followed.<sup>2</sup>

§ 66. The priority of maritime liens is governed by different rules from those at common law, although in two late cases<sup>3</sup> the reasonableness and justice of the maritime system have induced the Supreme Court of the United States to apply its principles to the rights of creditors of railroads for wages and supplies. The principle which governs the administration of priorities treats the maritime lien as a proprietary interest, which interest, like that of the owner, becomes subject to subsequent liens incurred by the vessel in its employment, thus making the priorities enforceable in inverse

<sup>1</sup> *The Laurretta*, 9 Fed. Rep. 622; *The Dubuque*, 2 Abb. 20; *Daily v. Doe*, 3 Fed. Rep. 903; *The C. N. Johnson*, 19 Fed. Rep. 782.

<sup>2</sup> *The Guiding Star*, 18 Fed. Rep. 263, *The Red Wing*, 14 Fed. Rep. 869; *The Edith*, 94 U. S. 518.

<sup>3</sup> *Hale v. Frost*, 99 U. S. 389, and *Fosdick v. Schall*, 99 U. S. 235.

order to the date of their creation; unlike that of liens at common law. So far as supplies and repairs are concerned, they are treated as expenditures on the property which is the fund for the preservation of the prior liens, and are therefore entitled to a priority; while on land the liens of mechanics and material-men, which preserve the house as a security for the mortgagee, are postponed to the lien of the mortgage.

§ 67. The maritime lien originated from the necessity to enable the vessel to carry on its business away from the home port, and for this reason the maritime law of the United States gives no lien for repairs and supplies at the home port, as the ship's necessity, which is the only necessity recognized by the maritime system, does not require a lien for such a purpose.<sup>1</sup>

The same principle applies to the maritime lien arising out of the law of carriage. It would not be possible to intrust the cargo to the ship if the only redress for a breach of duty by the carrier was to be had by seeking the owner at his place of residence. The maritime law, therefore, enforces the carrier's duties by a lien on the ship, but, as the shipowner has actual possession of the cargo,

<sup>1</sup> The *St. Jago de Cuba*, 9 Wh. at page 416. See opinion *In re Insurance Co.*, 22 Fed. Rep. 109.

the lien given by the maritime law against the cargo is not a privilege but only a possessory lien, which the master loses by parting with the possession. The maritime lien for supplies and repairs is not divested by a prior forfeiture incurred by the owner.<sup>1</sup>

§ 68. The same rule has been applied to liens growing out of torts. As in such cases the personal liability of the owner is limited to the value of the ship and freight pending, except where the owner's personal wrong has created the loss, there would be practically no security for such losses if the maritime rule did not apply. It has accordingly been held that a claim for collision becomes a proprietary interest in the vessel, which, according to the rule of maritime priorities, takes precedence of maritime liens<sup>2</sup> incurred prior in point of time.

This has been applied in cases between holders of bottomry bonds and claims growing out of collision. The reason for sustaining the rule given in

<sup>1</sup> *The St. Jago de Cuba*, 9 Wh. 409; *The Malek Adhel*, 2 How. 210.

<sup>2</sup> *Force v. The Pride of the Ocean*, 3 Fed. Rep. 162; *The Aline*, 1 Wm. Rob. 112; *The Frank G. Fowler*, 8 Fed. Rep. 331; this latter case was reversed on appeal, 17 Fed. Rep. 653; *The Maria and Elizabeth*, 12 Fed. Rep. 627; *Norwich Co. v. Wright*, 13 Wall. 104; *The Enterprise*, 1 Low. 455; *The Linda Flor*, Swabey, 309.

The *Aline*,<sup>1</sup> is the pertinent one: "The suitor in damage has no option, no caution to exercise; the creditor on mortgage or bottomry has. He may consider all the possible risks, and advance his money or not, as he may think most advisable for his own interest. He has an alternative; the suitor in a cause of damage has none."<sup>2</sup>

But as between parties having claims for damage against the same vessel, the rule is said, in a late case, not to apply.<sup>3</sup> This was a case in which separate claims for damage had been incurred by a tug to tows on different voyages. The priority of the claim in the first cause of injury was sustained over that for which a lien against the vessel had been subsequently incurred. The reasoning of the case destroys the rule of priorities of maritime liens in all cases of tort.

The principle is said to have no place except in the case of loaning money, furnishing supplies, making repairs, salvage, and claims arising out of contracts generally. "Such services benefit the vessel, make her better, preserve her, contribute to save her or improve her, or help her in running,

<sup>1</sup> 1 Wm. Rob. at 118.

<sup>2</sup> See, also, *The America*, 16 Law Rep. 264.

<sup>3</sup> *The Frank G. Fowler*, 17 Fed. Rep. 653, reversing the same case in 8 Fed. Rep. 331.



for the benefit of all who have prior liens or claims on her. But a second tort or collision can have no such effect in reference to a party injured by a prior tort or collision. The second tort or collision does not benefit the vessel or add to her value or preserve her. It only tends to injure her; and the sufferer by the first tort or collision, in having recourse against the vessel after the second tort or collision, must take her as he finds her, damaged perhaps by a second collision.”<sup>1</sup>

This case leaves the rule of the priority of liens arising from torts in doubt, and is inconsistent with the general rule that liens, arising out of employment in successive voyages, take precedence in inverse order to their occurrence,<sup>2</sup> and, by which those of equal rank incurred on the same voyage, may be enforced according to the inverse order of time.<sup>3</sup>

The distinction between liens arising out of claims which are a benefit to and preserve the ship, and claims for damage and torts, has been followed in other cases. The former are treated as concurrent, and to be paid *pro rata* when incurred on the

<sup>1</sup> See, also, *The Samuel J. Christian*, 16 Fed. Rep. 796; *The Arctic*, 22 Fed. Rep. 126.

<sup>2</sup> *The America*, 16 Law Rep. 264.

<sup>3</sup> *The Sea Witch*, 3 Woods, 75; *The Omer*, 2 Hughes, 96; *The Melita*, 3 Hughes, 494.

same voyage,<sup>1</sup> while the latter have been postponed to those for supplies and repairs.<sup>2</sup>

Towage services and pilotage<sup>3</sup> hold the same rank as claims for necessary materials and supplies.<sup>4</sup> But the lien arising from a tort must still be considered a proprietary one, so that a lien growing out of collision takes precedence of a prior bottomry bond given at the commencement of the voyage.<sup>5</sup>

§ 69. It is usual to speak of certain liens as being in themselves of superior rank and entitled to take precedence of others in payment; seamen's wages, salvage, and bottomry, being spoken of as such;<sup>6</sup> but the distinction of grade is not often

<sup>1</sup> *The J. W. Tucker*, 20 Fed. Rep. 129.

<sup>2</sup> *The Samuel J. Christian*, 16 Fed. Rep. 796. This was a case of damage growing out of a towage contract. It is consistent with the *Frank G. Fowler*, 17 Fed. Rep. 653, but it is opposed to that of *The Pride of the Ocean*, 3 Fed. Rep. 162. In *The Grape-shot*, 22 Fed. Rep. 123, damage sustained under a towage contract is not treated as wholly involuntary as in torts by collision.

<sup>3</sup> *Porter v. The Sea Witch*, 3 Woods, 75.

<sup>4</sup> *The Athenian*, 3 Fed. Rep. 248; *The City of Tawas*, *ibid.* 170.

<sup>5</sup> *The Pride of the Ocean*, 3 Fed. Rep. 162; *The Aline*, 1 Wm. Rob. 112.

<sup>6</sup> The priority of a bottomry creditor cannot extend further than the voyage upon which the loan was made. *Blaine v. The Charles Carter*, 4 Cranch, 228. And on the lakes where the employment

discernible in effect. A bottomry bond given at the commencement of a voyage may be postponed to a claim arising out of a subsequent collision.<sup>1</sup> Seamen's wages are of the highest rank from the necessity of their services to preserve other liens, and because they are treated as a privileged class. While the lien for seamen's wages may be prior to that of salvage, when they remain by the wreck,<sup>2</sup> and is preferred to that of a bottomry bond given in the course of the same voyage, both in respect to wages earned before and after the giving of the bond,<sup>3</sup> yet seamen's wages which accrued before have been postponed to a subsequent claim for salvage;<sup>4</sup> and seamen's wages due at the time of a collision are postponed to a claim for damages growing out of the collision for the reason, among

of a vessel during a season is treated as a single voyage, the relative grade in rank of liens is said to be established by usage. *The City of Tawas*, 3 Fed. Rep. 170.

<sup>1</sup> *The Pride of the Ocean*, 3 Fed. Rep. 162; *The Aline*, 1 Wm. Rob. 112.

<sup>2</sup> Otherwise if they abandon it. *Dalstrom v. The E. M. Davidson*, 1 Fed. Rep. 259; *The Davidson*, 9 Biss. 275.

<sup>3</sup> *The Union*, Lush. 128; *The Hilarity*, 1 Bl. & H. 90; *The Wm. F. Safford*, Lush. 69; *The Virgin*, 8 Peters, 538.

<sup>4</sup> *The Athenian*, 3 Fed. Rep. 248; *Collins v. The Ft. Wayne*, 1 Bond, 476; *The Selina*, 2 Notes of Cases, 18; *The Panthea*, 1 Asp. M. C. 133; s. c., 25 L. T. (N. S.) 389; *The Gustaf*, Lush. 506.

others, that they share in the fault of the vessel to which they belong, and the lien for damage takes precedence from considerations of public policy to prevent careless navigation,<sup>1</sup> although the postponement of their claim has been denied in other cases.<sup>2</sup>

The English admiralty holds that the maritime lien, arising out of damage done by a foreign vessel in a collision for which she is to blame, takes precedence of the maritime lien of the seamen on board such vessel for wages earned by them, both before and after the collision.<sup>3</sup> One reason, among others, for the decision as to wages earned after the collision, which otherwise would have priority, is that seamen have a claim against the owner which they can enforce in their own country, and the claimant in collision will not be sent to another jurisdiction when the proceeds are in the hands of the court. In a cause of damage, however, arising out of a contract of towage the lien for damage was held to be inferior to that of the seamen of

<sup>1</sup> Abbott on Shipping, 2d ed. p. 621 ; *The Maria and Elizabeth*, 12 Fed. Rep. 627 ; *The Enterprise*, 1 Low. 455 ; *The Linda Flor*, Swabey, 309 ; *The Elin*, L. R. 8 P. D. 39 ; *The Benares*, 7 Notes of Cases, 538 ; *The Pride of the Ocean*, 7 Fed. Rep. 247.

<sup>2</sup> *The Orient*, 10 Ben. 620 ; *The Samuel J. Christian*, 16 Fed. Rep. 796.

<sup>3</sup> *The Elin*, L. R. 8 P. D. 39 ; *The Linda Flor*, Swabey, 309.

the tug which had previously accrued, and also to that for supplies and repairs antecedently incurred.<sup>1</sup>

Salvage services are usually incurred the last, and are, therefore, generally paid first in order of preference, yet a claim for salvage will be postponed to a subsequent lien for supplies obtained after that for salvage had attached, so that a bottomry bond, given subsequently to salvage expenses incurred, is a legitimate deduction from the value of the property saved.<sup>2</sup>

The liens arising from contracts of affreightment are said to be inferior in grade to those incurred in the voyage for the direct benefit and preservation of the ship.<sup>3</sup> Yet the claim for damage to cargo on board of a vessel condemned for a collision has been placed on an equality with a claim for damage to another vessel and her cargo.<sup>4</sup>

#### § 70. The priority of liens among material men

<sup>1</sup> *The Samuel J. Christian*, 16 Fed. Rep. 796.

<sup>2</sup> *The Selina*, 2 Notes of Cases, 18. It is difficult to see why money furnished on bottomry at marine interest, although the borrower is exempt from personal responsibility, should have priority over the tacit hypothecation by the master at a foreign port, at the ordinary rate which also binds the owner personally.

<sup>3</sup> *The America*, 16 Law Rep. 264.

<sup>4</sup> *Norwich Co. v. Wright*, 13 Wall. 104. See note on the Priority of Maritime Liens by Orlando F. Bump, Esq.; *The De Smet*, 10 Fed. Rep. at 491.

was adjudged by Betts, J., in the *Triumph*<sup>1</sup> to depend upon the rule of *prior petens*, so that liens of the same rank and grade had priority according to the date of the process issued. This rule was also adopted, in the English admiralty, by Dr. Lushington in *The Saracen*,<sup>2</sup> but it no longer exists.<sup>3</sup> Every maritime lien dates from its inception, and it is inconsistent with the nature of a maritime lien that it should depend upon the date at which its enforcement is sought.<sup>4</sup> The process *in rem* merely puts into execution an inchoate right in the creditor or holder of the lien, and the rule, as laid down by Hall, J., in *The America*<sup>5</sup> is now followed,<sup>6</sup> so that beneficial liens

<sup>1</sup> 2 Blatch. 433 n ; s. c., 1 Sprague, 428, followed by the Circuit Court in *The Globe*, 2 Blatch. 427 ; *The Adele*, 1 Ben. 309 ; and in the Eastern District of Penna. in *The Pathfinder*, 4 W. N. C. (Pa.) 528.

<sup>2</sup> 6 Moore, P. C. C. 56, and *The Wm. F. Safford*, Lush. 69.

<sup>3</sup> See Welker, D. J., in *The Arcturus*, 18 Fed. Rep. 743.

<sup>4</sup> *The Guiding Star*, 18 Fed. Rep. 263 ; *The Arcturus*, 18 Fed. Rep. 743 ; *The J. W. Tucker*, 20 Fed. Rep. 129 ; *The Lady Boone*, 21 Fed. Rep. 731.

<sup>5</sup> 16 Law Rep. 264.

<sup>6</sup> *The Paragon*, 1 Ware, 322 ; *The Fanny*, 2 Low. 508 ; *The E. A. Barnard*, 2 Fed. Rep. 712 ; *The Frank G. Fowler*, 8 Fed. Rep. 331 ; *Ibid.*, 17 Fed. Rep. 653 ; *The Omer*, 2 Hughes, 96 ; *The Athenian*, 3 Fed. Rep. 248 ; *The Samuel J. Christian*, 16 Fed. Rep. 796 ; *The J. W. Tucker*, 20 Fed. Rep. 129.

contracted in the same voyage are in the same grade of priority, and liable to be divested by others occurring subsequently to their inception, and by those for supplies and materials in succeeding voyages.<sup>1</sup>

A distinction exists on the lakes, occasioned by the shortness and frequency of the voyages, by which the liens created in one season of navigation are placed on an equality with those on one voyage.<sup>2</sup> And the same rule is applied to liens arising in harbor navigation, out of contracts of towage,<sup>3</sup> and from claims for ordinary supplies and repairs to a vessel employed in running about a harbor, which are contemporaneous, or nearly so, and which are paid *pro rata* in case of insufficiency;<sup>4</sup> where they are not contemporaneous, and of equal rank, they may be satisfied in the order in which they occur.<sup>5</sup> Supplies furnished to a vessel while

<sup>1</sup> The E. A. Barnard, 2 Fed. Rep. 712; The Fanny, 2 Low. 508; The Superior, Newberry, 176.

<sup>2</sup> The Hercules, 1 Brown's Adm. 560; The City of Tawas, 3 Fed. Rep. 170; The America, 16 Law Rep. 264; The Buckeye State, 1 Newb. 111; The Athenian, 3 Fed. Rep. 248. The reader is referred to the opinion of Judge Hall in The America, 16 Law Rep. 264, as a full and authoritative discussion of the priority of maritime liens.

<sup>3</sup> The J. W. Tucker, 20 Fed. Rep. 129.

<sup>4</sup> The Grapeshot, 22 Fed. Rep. 123.

<sup>5</sup> The J. W. Tucker, *ante*.

under arrest, and navigated by the permission of the marshal, do not take precedence of those under which the vessel was arrested.<sup>1</sup>

§ 71. There is also a conflict in the decisions as to the relative priority of liens given by the maritime law and by statute. Statutory liens in some circuits are placed on an equality of grade with liens under the maritime law; in others the purely maritime liens are held to be superior in grade to those created by statute; so that maritime liens have been held entitled to superiority in payment to a lien created by a statute, which, if it had been implied by the maritime law, would have been on an equality with, or even superior to the lien to which it was postponed.<sup>2</sup>

The reason given in *The E. A. Barnard*, is that the priorities given by statute may be regulated by a different rule of priority from that given by the maritime law.<sup>3</sup> But the difficulty in the way of

<sup>1</sup> *The Grapeshot*, 22 Fed. Rep. 123.

<sup>2</sup> *The E. A. Barnard*, 2 Fed. Rep. 712; *The City of Tawas*, 3 Fed. Rep. 170; *The Athenian*, 3 Fed. R. 248; *The John T. Moore*, 3 Woods, 61.

<sup>3</sup> This was a reason given for repealing the 12th Rule of 1844, by the Supreme Court (*The St. Lawrence*, 1 Black, 522); as the present rule enforces the lien given by statute, it would appear that the rule of priorities now given is according to that of the general maritime law. See *the Guiding Star*, 18 Fed. Rep. 268.



administering the lien given by the state law, under process in admiralty, is inherent, unless the admiralty enforces a statutory lien for supplies as a maritime one: certainly it is not a lien analogous to that at common law, dependent upon possession or registration.<sup>1</sup> On the question of merits of services toward the preservation of the vessel, as a means of satisfying the claims of creditors, no distinction can be drawn between supplies at the home port and at a foreign port. Although the refusal of a lien by the maritime law of the United States for supplies at a domestic port is a reasonable one, since it is not required by the vessel's necessities, yet, when allowed, it would seem to stand upon the same grade of merit as purely maritime liens, and is so decided in other circuits.<sup>2</sup>

It is pointed out with force in the opinion in *Stewart v. The Potomac Ferry Co.*,<sup>3</sup> that in cases where the rights of suitors depend upon the admiralty law, the common law, whose rules of decision are, in a great class of cases, violently the reverse of those obtaining in the admiralty courts,

<sup>1</sup> See opinion of Treat, J., in the *Red Wing*, 14 Fed. Rep. 869.

<sup>2</sup> *The General Burnside*, 3 Fed. Rep. 228; *The Delos De Wolf*, 3 Fed. Rep. 236; *The De Smet*, 10 Fed. Rep. 483; *The Guiding Star*, 18 Fed. Rep. 263; *The Grapeshot*, 22 Fed. Rep. 123; *The Arctic*, *ibid.* 126.

<sup>3</sup> 12 Fed. Rep. 296.

is incompetent to afford the remedies contemplated by the ninth section of the Act of 1789, and for this reason the admiralty has been obliged to enforce the lien given by the statute of a state. In a large number of cases, an admiralty suit is in the nature of a creditor's bill in equity, in which the ship has to be sold, and the claims of creditors marshalled and adjusted according to priorities, observed and respected in all the admiralty courts of the world, in respect to ships.

One of the strongest reasons for restraining the exercise of all proceedings to enforce liens in maritime cases by the state courts, is the necessity of preserving the same rule of priorities, by confining their enforcement to one jurisdiction, which will adjust the same according to the rule prevailing in maritime procedures, and prevent the confusion referred to in the case of *The De Smet*.<sup>1</sup> In one of the latest cases, this discrepancy in the decisions in the different circuits was considered, and it was held: 1st. The liens given by statute in maritime contracts are of equal rank with those given by maritime law, and 2d. That the admiralty in enforcing such statutory liens does not adopt the statute itself, or the construction placed upon it by courts of common law or of equity, when they

<sup>1</sup> 10 Fed. Rep. 483; see *The Guiding Star*, 18 Fed. Rep. 263.

apply it. 3d. That while all conditions conferred by the statute must be complied with, beyond that, the statute does not give the rule establishing the priorities between conflicting claims. The admiralty treats the liens as a maritime contract conferred by the maritime law, and enforces these according to the rule of priority of the admiralty courts, and it ignores all liens given by the statute in subjects not maritime, such as mortgages, and for building vessels, except so far as to allow them as lienors to intervene in the surplus.<sup>1</sup>

§ 72. A distinction has also been drawn between liens created by act of congress and by state legislation, which, by analogy to regulations of commerce by congress, are supposed to supersede state legislation on the same subject. It has been applied to mortgages of ships, the lien of which is regulated by act of congress, and to liens given by state statutes.<sup>2</sup>

But a mortgage is not a maritime contract, and the right of congress to regulate mortgages of vessels is derived from the commercial clause of

<sup>1</sup> *The Guiding Star*, 18 Fed. Rep. 263, decided by Mr. Justice Matthews in October, 1883, it is followed in *The Grapeshot*, 22 Fed. Rep. 123; *The Arctic*, 22 Fed. Rep. 126.

<sup>2</sup> *The De Smet*, 10 Fed. Rep. 483; *The John T. Moore*, 3 Woods, 61; *Scott's Case*, 1 Abb. 336; *Baldwin v. The Bradish Johnson*, 3 Woods, 582; *The Grace Greenwood*, 2 Biss. 131.

the constitution, not from the grant of admiralty and maritime jurisdiction.<sup>1</sup> The lien is not to be treated as maritime, but it is analogous to those enforced in equity or at common law.<sup>2</sup>

It is consequently not entitled to participate in the priorities given by the maritime code, and is postponed to liens created by the maritime law or by statute.<sup>3</sup> If the mortgagee allows the mortgagor to retain possession of the vessel, he is deemed to assent to the creation of such liens as arise in the ordinary employment of the vessel, and are necessary to the preservation of the mortgaged property.<sup>4</sup> Such advances are for the benefit of the mortgagees as well as of the owners.<sup>5</sup> If the mortgagee takes possession under his mortgage, he is in all respects the owner, and his claims under the mortgage will be postponed as such

<sup>1</sup> *White's Bank v. Smith*, 7 Wall. 646; *Aldrich v. The Ætna Co.*, 8 Wall. 491.

<sup>2</sup> *Bogart v. The John Jay*, 17 How. 399.

<sup>3</sup> *The Emily Souder*, 17 Wall. 666; *The Canada*, 7 Fed. Rep. 730; *The Guiding Star*, 18 Fed. Rep. 263.

<sup>4</sup> *The John Farron*, 14 Blatch. 24; *The E. M. McChesney*, 8 Ben. 150; *The Wm. T. Graves*, 14 Blatch. 189; *The Hiawatha*, 5 Sawyer, 160; *The Island City*, 1 Low. 375; *The St. Josephs*, 1 Brown's Adm. 202; *The Norfolk & Union*, 2 Hughes, 123; *The Favorite*, 3 Sawyer, 405; *The Charlotte Vanderbilt*, 19 Fed. Rep. 219.

<sup>5</sup> *The Charlotte Vanderbilt*, 19 Fed. Rep. 219.

owner; and a judicial sale under a decree of foreclosure of a mortgage will not divest such prior maritime liens.<sup>1</sup>

The act of congress in relation to the recording of mortgages, expressly providing for the priority of bottomry bonds over such recorded mortgages, gives color to the construction which excludes any priority over such mortgages or liens created by statute; but the same reasoning would give such mortgages priority over other purely maritime liens, a construction which nothing but express words of the statute could sustain; and a mortgage so recorded is decided not to be a maritime lien or entitled to priority as such.<sup>2</sup>

Among the rules laid down<sup>3</sup> is one that claims

<sup>1</sup> The *Wm. T. Graves*, 14 Blatch. 189.

In *The De Smet*, 10 Fed. Rep. 483, the court followed the previous rulings in the Circuit Court, although dissenting from their correctness. The effect of this ruling produced the result that an unrecorded mortgage had priority, on distribution of a fund arising from the sale of a vessel, over the claims of material-men and for supplies at her home port, which were statutory liens, because of another mortgage recorded under the act of congress, which was held to be superior to a state lien for supplies; and the unrecorded mortgage had priority over the recorded mortgage by reason of notice. See, also, *Baldwin v. The Bradish Johnson*, 3 Woods, 582.

<sup>2</sup> The *Emily Souder*, 17 Wall. 666; The *Wm. T. Graves*, 14 Blatch. 189.

<sup>3</sup> *Norwich Co. v. Wright*, 13 Wall. 104.

for damages to cargo on board of the vessel in fault, and lost by collision, shall be on an equality in distribution with the claims of the vessel injured by the collision; the point was not necessarily involved, and, as respects a stranger, the ship is the servant of its cargo.<sup>1</sup> The rule of maritime priorities would seem to be otherwise. Liens arising out of contracts of affreightment are said to rank below those for supplies and collisions;<sup>2</sup> and as the lien of the cargo against the ship attaches from the moment it is taken on board, and is anterior in date to that arising from a collision on the voyage, the latter lien becomes superior to that which arises out of the lading of the cargo. But all liens arising out of the same voyage, except those for supplies, are not of equal priority.<sup>3</sup> Considerations, arising out of the effect of the act of congress limiting the liability of owners for cargo in contracts of affreightment, would seem to require a higher rank for liens growing out of such contracts, in order to give adequate remedy against the vessel, since the protection to shippers from

<sup>1</sup> *Barnes v. The Winchester*, 25 Leg. Int. (Pa.) 196, decided by Grier, J.

<sup>2</sup> *The America*, 16 Law. Rep. 264.

<sup>3</sup> *The Athenian*, 3 Fed. Rep. 248; *The Aline*, 1 Wm. Rob. 112; *ante*, § 69.

the personal liability of the owner has practically ceased.

The rule that a passenger is so identified with his own conveyance that he cannot recover for the negligence of a third person, if there was contributory negligence on the part of those conducting the conveyance in which he was a passenger,<sup>1</sup> if applicable, would seem to be inconsistent with the rule putting the cargo of the vessel in fault on an equality with the claim of the vessel injured by its fault. In *Spaight v. Tedcastle*,<sup>2</sup> the application of the rule to a fault committed by a pilot employed by a ship, was said "not to be a self-evident proposition," but was followed in *The Energy*.<sup>3</sup> In America it does not seem to be everywhere adopted.<sup>4</sup>

§ 73. In the administration of admiralty liens, the admiralty enforces those created by the law of the place of contract or of the nation to which the ship belongs.<sup>5</sup> But the right of priority forms no part of the contract, it is extrinsic, and de-

<sup>1</sup> *Thorogood v. Bryan*, 8 C. B. 115; *Catlin v. Hills*, *ibid.* 123.

<sup>2</sup> L. R. 6 App. Cases, 217.

<sup>3</sup> L. R. 3 A. & E. p. 47; see, however, *Duggins v. Watson*, 15 Arkansas, 118, and *Simpson v. Hand*, 6 Wharton (Pa.) 311.

<sup>4</sup> See Wharton on Negligence, § 395.

<sup>5</sup> *The Maggie Hammond*, 9 Wall. 435; *Story's Conflict of Laws*, § 322.

pends upon the law of the place where the property lies, and where the court sits which is to decide the cause.<sup>1</sup> The priority of liens is administered according to that given by the *lex fori*, and is regulated by that law exclusively.<sup>2</sup>

<sup>1</sup> *Harrison v. Sterry*, 5 Cranch, 289, Marshall, C. J.

<sup>2</sup> *The Union*, Lush. 128; *The Graf Klot Trautvetter*, 8 Fed. Rep. 883; *The Selah*, 4 Sawyer, 40; Story's *Conflict of Laws*, 3d ed. § 323; Wharton's *Conflict of Laws*, § 324; *contra*, *The Velox*, 21 Fed. Rep. 479; where the distribution was made under the law of the Netherlands. The law of the Netherlands might create a lien, but could not divest one given by the maritime law or by the local law, and all questions of priorities are governed by the law of the forum or of the *locus rei sitas*. See *The Graf Klot Trautvetter* and *Harrison v. Sterry*, *supra*



## CHAPTER IV.

## COLLISION.

General principles, § 74.	Degree of fault not considered, § 84.
The vessel treated as a person or actor, § 75.	Inevitable accident, § 85.
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§ 74. THE rules of practice and of evidence in admiralty are not within the scope of the subject proposed to be treated, and except in collision and in liens administered by the maritime rules, the law governing both contracts and torts as administered in admiralty does not differ materially from that administered in other jurisdictions. But there are certain principles so peculiar to admiralty proceedings in actions for collision, as to constitute them a class *sui generis* and produce results radically different from those attending other actions for torts.<sup>1</sup>

<sup>1</sup> The Hudson, 15 Fed. Rep. 162.

§ 75. The principles peculiar to the admiralty proceedings in causes of collision are those which treat the vessel as an actor or person, and which divide the damages when both vessels are in fault.

At common law, where fault exists on the part of the plaintiff, which is contributory to the damage suffered by him, he cannot recover against the defendant in an action for a tort. This was the universal rule of the common law courts in actions arising from collisions on water as well as on land, and it was also the rule of the civil law.<sup>1</sup>

The rules which formerly applied in cases of contributory negligence in the English common law courts differed from those adopted in the admiralty. It is now, however, provided in England by the 25th section of the Judicature Act of 1873, that "in any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to be in fault; the rules in force in the Court of Admiralty so far as they have been at variance with the rules in force in the courts of common law shall prevail."<sup>2</sup>

<sup>1</sup> Wharton on Negligence, § 300; *Simpson v. Hand*, 6 Wh. (Pa.) 311; *Thorogood v. Bryan*, 8 C. B. (65 E. C. L. R.) 115; *Catlin v. Hills*, 8 C. B. (65 E. C. L. R.) 123; *Armstrong v. The Lancashire and Yorkshire Ry. Co.*, L. R. 10 Exch. 47; *Vanderplank v. Miller*, 1 M. & M. (22 E. C. L. R.) 169; see *Spaight v. Tedcastle*, L. R. 6 App. Cases, 217.

<sup>2</sup> Maude & Pollock, *Law of Merchant Shipping*, 4 ed., p. 631.

And while at law and in actions *in personam*, the responsibility of the owner is dependent on the law of agency,<sup>1</sup> in proceedings *in rem* against a vessel for a collision, in the American admiralty, the vessel itself is treated as an actor or a person capable of doing right and wrong, and the results fall upon the vessel which is in fault, without regard to the personal liability of the owners of the vessel for the acts of their agents.<sup>2</sup> So that the property of the owner may be condemned for a fault which entails no personal liability. Although the cargo is not liable for damage occasioned by the vessel to another in collision, even if the property of the owner of the vessel;<sup>3</sup> yet those who have received damage are entitled to be indemnified out of the freight due to the vessel from its cargo, as freight is accessory to the ship; and the cargo may be arrested

There is a manifest inconsistency in a different rule of responsibility being allowed to exist, accordingly as the cause is tried in the admiralty courts, or in a common law court of the same country, and as the admiralty rule has met with general approbation, it would be desirable for congress to legislate on the subject, which it has the right to do under the commercial clause of the constitution. Art. I. § 8.

<sup>1</sup> *Scull v. Raymond*, 18 Fed. Rep. 547; *Thorp v. Hammond*, 12 Wall. 408.

<sup>2</sup> *The China*, 7 Wall. 53.

<sup>3</sup> *The Victor*, Lush. 72; *The Leo*, *ibid.* 444.

for the freight in the action brought against the ship.<sup>1</sup> The court can also exercise its jurisdiction over the freight by monition to the parties holding it, to bring it into court to abide the result of the suit against the ship,<sup>2</sup> or by attaching it in the hands of the owners of the cargo.<sup>3</sup>

This rule of liability of the *res* has been traced to the application of the law of deodand, by which the instrument which inflicts an injury is confiscated.<sup>4</sup>

<sup>1</sup> The *Caroline*, 1 Low. 173; The *Flora*, L. R. 1 A. & E. 45; The *Leo*, *ante*; The *Roecliff*, L. R. 2 A. & E. 362; The *Gratitude*, 3 C. Rob. 240; The *Jacob*, 4 C. Rob. 245.

<sup>2</sup> *Sheppard v. Taylor*, 5 Peters, 675.

<sup>3</sup> *Snow v. Tons of Scrap Iron*, 11 Fed. Rep. 517; *Flaherty v. Doane*, 1 Low. 148-151. *Quare* as to the effect of Admiralty Rule, 15.

<sup>4</sup> *Waples' Proceedings in Rem*, § 116. The English admiralty has not adopted the American view of the liability of the vessel for a collision; but treats the process *in rem* as the means of enforcing the *jus in personam*. In a proceeding *in rem* for a collision caused by the wilful misconduct of the master of an English vessel to a foreigner, the libel was dismissed for the reason that the owners were not liable for the wilful misconduct of a servant, but only for his negligence in the course of his employment. The *Druid*, 1 Wm. Rob. 392, in which Dr. Lushington says: "I am, therefore, under the necessity of dismissing the owners. I cannot, however, leave this case without expressing my deep regret that in British waters, within British jurisdiction, the unfortunate foreigner who is master and owner of this vessel

This principle prevails in other questions than those arising from collisions. A libel of information was filed *in rem* against a vessel upon a seizure brought for a violation of the act of March 3, 1819, to protect the commerce of the United States, and to punish the crime of piracy. It was admitted on behalf of the government that the vessel had been equipped for an innocent commercial voyage, and that the owners never contemplated or authorized the acts of the master during the voyage, upon which the claim of forfeiture was founded.

It was held that, by the terms of the act, the vessel which commits the aggression was treated as the offender, without regard to the personal responsibility or misconduct of the owner; and in this followed the general maritime law, in "collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as

should have been subjected to this outrage and loss, not only without redress, but without any punishment being inflicted upon the aggressor."

In effect the English admiralty treats the process *in rem* as a means to enforce the *jus in personam*, while the American admiralty has always adhered to the principle established by Judge Story, in *The Malek Adhel*, 2 How. 210, making the vessel's liability independent of the question of ownership or of agency.

the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party.”<sup>1</sup>

§ 76. This principle of liability without regard to agency is applied to collision. In *The China*,<sup>2</sup> an action was brought *in rem* against a British steamship for a collision while in charge of a pilot furnished under the laws of New York. By the construction of the British pilotage acts the owners are not liable for the faults of a vessel committed while in charge of a pilot taken by compulsion. The court held that although the pilot on board was taken by compulsion under the laws of New York, to a port of which state the vessel was bound, the liability of the vessel was not to be determined

<sup>1</sup> U. S. v. *The Malek Adhel*, 2 How. at 234. The same doctrine was held as to seizures in revenue causes in *The Palmyra*, 12 Wh. 1; and to a case arising under the embargo laws, U. S. v. *The Little Charles*, 1 Brock. at 354; in which Chief Justice Marshall uses the following language: “It is a proceeding against the vessel for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offence. . . . But this body is animated and put in action by the crew who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore not unreasonable that the vessel should be affected by this report.”

<sup>2</sup> 7 Wall. 53.

by the question of agency, and that the fault of such a pilot in the navigation of the vessel did not exempt the vessel from liability for a collision so occasioned.<sup>1</sup>

In the previous case of *Smith v. Condry*,<sup>2</sup> which was an action between the owners of two American ships, one of which, the defendant, was in charge of an English pilot taken on board under the provisions of the Liverpool pilotage act, the Supreme Court held that, as the collision had taken place in English waters, and as under the construction of the English statute by their courts, the services of the pilot were compulsory on the vessel, and neither the vessel nor the owners were responsible for the faults of a pilot so taken on board, the case was

<sup>1</sup> The liability of the vessel *in rem* exists also for supplies, ordered by others than the general owners or their agents, so that the vessel may be liable *in rem* although her owners may have incurred no personal liability. *The India*, 16 Fed. Rep. 262, s. c. 21 Blatch. 268; *Thomas v. Osborn*, 19 How. 22; *The John Farron*, 14 Blatch. 24; *Scull v. Raymond*, 18 Fed. Rep. 547; and in the same manner is liable for money taken upon bottomry by the master. *The Virgin*, 8 Peters, 538, and for salvage, *The Sabine*, 101 U. S. 384, although the owners are not responsible for the amount unless the vessel or its proceeds has come into their hands, or the service has been done at their request. See Chapter III., and Admiralty Rules, 18 and 19.

<sup>2</sup> 1 How. 28.

governed by the English law, and that the owners were not personally liable.<sup>1</sup>

<sup>1</sup> This case was cited in *The Eagle*, 8 Wall. p. 22, and was held to have been decided upon principles peculiar to the pilotage laws, which, as stated in the case of *The China*, 7 Wall. 53, are port regulations into which the vessel voluntarily enters and becomes subject. See also *The Merrimac*, 14 Wall. 199. The English admiralty adopted the same rule in *The Annapolis*, Lush. 295. The English statute is decided to take away all liability of the vessel and her owners whenever the accident was to be attributed to the fault of a pilot imposed upon the vessel by the law of the place; *The Protector*, 1 Wm. Rob. 45; *The Maria*, *ibid.* 95; *Caruthers v. Sydebotham*, 4 Maule & Selwyn, 77. It had been previously decided otherwise by Sir John Nichol in *The Girolamo*, 3 Hagg. 169; and by Sir Wm. Scott, in *The Neptune the Second*, 1 Dodson, 467. Sir Robert Phillimore expressed his regret that the rule had been so established in England, as the working of the law had been fruitful of injustice. *The Halley*, L. R. 2 A. & E. 3. He followed the law as laid down in *Smith v. Condry*, 1 How. 28, in a collision which occurred in Belgian waters, but was reversed by the judicial committee of the Privy Council. *The Halley*, L. R. 2 P. C. 193.

Judge Grier decided, in *The Creole*, 2 Wall., Jr., 485, that the half pilotage recoverable from a vessel in refusal of pilotage services did not constitute a penalty which rendered the services of the pilot compulsory. Mr. Justice Clifford was of the same opinion in his dissent from the majority of the court in *The China*, 7 Wall. at 69; and in a later case the Supreme Court adopted the same view, that half pilotage to a pilot who tendered his services to a vessel coming into port, which are refused, is not a penalty, but compensation under an implied contract created by statute. *Ex parte McNeil*, 13



§ 77. The peculiar principle of apportioning the damages in collision between the two vessels, when both vessels are in fault, applies only to the damages suffered by the vessels themselves. It does not apply to the claim of the owner of cargo on board of the libellant's vessel or of the owner of a vessel being towed. Where the suit is brought against only one of two vessels and both are adjudged to be in fault, the libellant is entitled to recover in full the amount of his damages without regard to the right of apportionment between the two vessels in fault.<sup>1</sup> The same principle applies whenever two vessels are separately liable to a third party for the consequences of a collision.<sup>2</sup>

Wall. 236; see, also, *The Merrimac*, 14 Wall. 199. The state courts have held the same doctrine in suits against the owners. *Bussy v. Donaldson*, 4 Dall. 206; *Williams v. Price*, 4 Martin (N. S.), 399; *Yates v. Brown*, 8 Pick. (Mass.) 23; *Denison v. Seymour*, 9 Wend. 1.

<sup>1</sup> *The Washington and The Gregory*, 9 Wall. 513; *The Alabama and The Gamecock*, 92 U. S. 695; *The Virginia Ehrman and The Agnese*, 97 U. S. 309; *The City of Hartford and The Unit*, 97 U. S. 323; *The Atlas*, 93 U. S. 302; *The Juniata*, 93 U. S. 337.

<sup>2</sup> *The Civilta and The Restless*, 103 U. S. 699; *The Atlas*, 93 U. S. 302. The authorities confine the application of the rule, of dividing the damages in case of mutual fault, to collisions between vessels. Pardee, J., in *The Explorer*, 20 Fed. Rep. at p. 139. See Story on Bailments, § 609; Sedgwick on Damages, vol. ii. p. 351, note; Bell's Commentaries, 5th ed., pp. 579-583; Code de

In actions for personal injuries to seamen and passengers, not arising from collision, the law of contributory negligence is the same in the admiralty as at common law.<sup>1</sup>

The American rule, which does not apply the apportionment of damage to the loss suffered by the cargo, has not been adopted in the English admiralty. The cargo, or a third party injured, recovers against each vessel where both are in fault, only half damages and without having a

Commerce, Art. 407. In an action against a tug, in *The Energy*, L. R. 3 A. & E. 47, the tug was in fault, but the libel was dismissed, as the fault of the pilot of the vessel in tow contributed to the damage. It has, however, been applied in actions for negligent towage, where the fault both of the tug and the tow contributed to the accident; *The Bordentown*, 16 Fed. Rep. 270; *Connolly v. Ross*, 11 Fed. Rep. 342; *The William Cox*, 9 Fed. Rep. 672. And in one case, to an action by the owner of cargo lost by negligence of the tug, where the unseaworthiness of the barge, of which the shipper had knowledge, contributed to the loss. *The William Murtagh*, 17 Fed. Rep. 259. See also *McCord v. The Tiber*, 6 Biss. 409.

<sup>1</sup> *Sunney v. Holt*, 15 Fed. Rep. 880; *The Explorer*, 20 Fed. Rep. 135. See *The Rheola*, 7 Fed. Rep. at p. 784; *The Chandos*, 4 Fed. Rep. 645. The court, however, on principles peculiar to the admiralty, allowed the seamen to recover for loss of wages and expenses while laid up in the hospital, in a case of contributory fault; *The Explorer*, *ante*; and in a subsequent case allowed the libellant costs, although the libel was dismissed on the ground of contributory negligence; *The Wanderer*, 20 Fed. Rep. 140.

right of recourse to the other vessel in case the value of one of the vessels is not sufficient to satisfy the decree.<sup>1</sup>

In the case of *The Milan*,<sup>2</sup> which was an action on behalf of the cargo of the brig, sunk by collision, against a steamer alone, both vessels were found in fault. Dr. Lushington, while admitting that the owners of the cargo did not stand in the same position as the owners of one of the two delinquent vessels, holds, nevertheless, that the Court of Admiralty must say:<sup>3</sup> "You, the innocent owners of the cargo, proceeding against one only of two delinquent ships, shall recover only half your damage, because we can affix to the vessel proceeded against only half the blame, and you shall be left, with respect to the other half of your loss, to your remedy against the owner of the other vessel, which we hold to be equally delinquent."<sup>4</sup>

<sup>1</sup> *Hay v. Le Neve*, 2 Shaw's Scotch App. Cases, 395; *The Milan*, Lush. 388; *The City of Manchester*, L. R. 5 P. D. 221; *Chapman v. The Royal Netherlands St. Nav. Co.*, L. R. 4 P. D. 157; *Stoomvaart Maatschappij Nederland v. The Peninsular & Oriental St. Nav. Co.*, L. R. 7 App. Cases, 795.

<sup>2</sup> Lush. 388.

<sup>3</sup> At page 404.

<sup>4</sup> In applying this rule the court was carrying out the principle of the passenger on the stage-coach in *Thorogood v. Bryan*, 8 C. B. (65 E. C. L. R.) 115; as the admiralty allows the ship, although in fault, to recover a moiety of its loss from the other vessel, it allows cargo, like the passenger, to recover to the same

The principle that a party shipping goods by a vessel so identifies himself with the conveyance selected by him that he cannot recover, if the vessel cannot, has been applied at common law.<sup>1</sup>

§ 78. But the American admiralty, while giving full redress to the owners of the cargo or other parties not implicated in fault, moulds its decree so as to apply the principle of apportionment between the two vessels in fault.

Thus where the owner of a cargo injured by a collision, or of a vessel being towed, sues, and recovers against both vessels, the libellant does not obtain a decree *in solido* against each for his whole damage; but a decree is rendered for a moiety of his damages against each with a right to collect from either, any part of the moiety, which he is unable to recover from the stipulators for either vessel by reason of the insufficiency in amount of the stipulation, or the insolvency of the stipulators.<sup>2</sup>

extent only, as the ship as its agent could. At common law, neither the ship nor the passenger could recover, if the negligence of the carrier was contributory to the loss.

<sup>1</sup> *Duggins v. Watson*, 15 Ark. 118. *Simpson v. Hand*, 6 Wh. (Pa.) 311; *Vanderplank v. Miller*, 22 S. C. L. R. 169.

<sup>2</sup> *The Alabama and The Gamecock*, 92 U. S. 695; *The Washington and The Gregory*, 9 Wall. 513; *The Virginia Ehrman and The Agnese*, 97 U. S. 309; *The City of Hartford and The Unit*, 97 U. S. 323.

And the same result was produced in an action by a passenger who was on board of a vessel for personal injuries suffered by a collision with another vessel.<sup>1</sup>

Where, however, two separate libels were filed, one on behalf of the vessel and the other of her cargo, against another vessel, and both vessels were found to be in fault, a decree for the full amount was entered on the libel on behalf of the owners of the cargo; but in order to apportion the loss on the cargo between both vessels, although no cross libel had been filed by respondent, the court directed in the decree that one-half the loss to the cargo be allowed as a deduction from the amount awarded in the libel to owners of the libellant's vessel for one-half the damage to the vessel sued. Having all parties before it the court held that it might do what it would have done, if there had been one libel, for the vessel and

<sup>1</sup> *The Washington and The Gregory*, 9 Wall. 513. In *The Juniata*, 93 U. S. 337, the District Court of Louisiana assessed the damages for personal injuries to the owner of a tugboat who was on board at \$20,000, and apportioned the loss, giving the libellant \$10,000; this fact is not noticed in the opinion of the court, but was necessarily decided. The point argued in the Supreme Court was the application of the rule dividing the damages in claims for personal injuries. See, however, *Sunney v. Holt*, 15 Fed. Rep. 880, and cases cited at p. 221, n. *ante*.

its cargo, *i. e.*, divide the whole loss throughout between the two colliding vessels.<sup>1</sup> And the principle was carried into effect by a decree in a cause in which the same libel included damages both to vessel and cargo.<sup>2</sup> Where the cargo, however, belongs to the same owner as the vessel, the cargo and vessel are treated as constituting one opposing force; the cargo is not treated as without fault, and the entire damage to the ship and cargo is divided between the two vessels.<sup>3</sup>

§ 79. In a late case of collision<sup>4</sup> brought by the owner of a barge being towed, against another vessel, in which action the tug in charge of the libellant's vessel was not made a party, the respondent and claimant of the vessel attached filed a petition alleging that the tug having charge of the barge was chargeable with fault contributing to the collision, and process was allowed to issue against the tug, so as to bring both vessels into adjudication in the same cause. This proceeding was allowed on the grounds that an apportionment of the damage was, under the decisions, recog-

<sup>1</sup> *The Eleanora*, 17 Blatch. at p. 105; *The Hercules*, 20 Fed. Rep. 205.

<sup>2</sup> *The Farnley*, 8 Fed. Rep., at p. 637.

<sup>3</sup> *The Alabama and The Gamecock*, 92 U. S. 695.

<sup>4</sup> *The Hudson*, 15 Fed. Rep. 162.

nized as a right of the vessel libelled where two vessels are in fault as to a third party, and the admiralty had the same powers as a court of chancery to bring all parties before them in the same suit, where rights would be affected, or where the principles of justice or convenience required it; as the respondent, if made liable for the whole consequence of the collision, would have a right of action against the other vessel which contributed to the collision. This procedure can be sustained under the act of congress of July 22d, 1813,<sup>1</sup> which enacts that where causes of a like nature are pending before a court of the United States, the court may make such orders and rules concerning procedure therein as may be conformable to usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate such causes when it appears reasonable to do so. This act is decided to be applicable to courts of the United States proceeding as courts of admiralty, and clothes them with authority, in cases of collision, to combine the suits arising therein into a single proceeding, and, where both parties are found to be in fault, to make a single decree in accordance with their rights and obligations as resulting from the law.<sup>2</sup>

<sup>1</sup> Rev. Stat. § 921.

<sup>2</sup> The North Star, 106 U. S. 17.

The Supreme Court has by rule 59, promulgated October Term, 1882, provided that the claimant of a vessel, who is responsible in proceedings *in personam* for collision, may, on petition showing fault or negligence in any other vessel or any other party contributing to the same collision, have process issued against such other vessel or party to make them parties to the cause which is to proceed as if the vessel or party had been originally proceeded against.<sup>1</sup>

§ 80. The rule under which damages are divided is believed to be that of recoupment. Each vessel is treated as a separate respondent. The counter claims are adjudicated in one proceeding, and where both vessels are found to be in fault, each pays one-half of the damages suffered by the owners of the other vessel and its cargo. The whole damage done to both vessels is put into one common mass, and each vessel pays one-half, the cargo being paid for in full without regard to the value of the respective vessels.<sup>2</sup>

The writers on commercial law treat the divided

<sup>1</sup> See *The Charkieh*, L. R. 4 A. & E. 120, applying the principle of this rule to foreigners outside the jurisdiction.

<sup>2</sup> *The Atlas*, 93 U. S. 302; *The Juniata*, 93 U. S. 337; *The Canima*, 17 Fed. Rep. 271; *Jessel, M. R. in Chapman v. The Royal Netherlands St. Nav. Co.*, L. R. 4, P. D. 157.



loss in collision under the head of average;<sup>1</sup> but as the maritime rule of contribution in average losses, such as salvage and jettison, always adopts value as the standard of contribution by the contributing interests which the maritime law of the United States and of England rejects in collisions, the principle is believed to be that of recoupment between wrong-doers carried into effect by apportionment.<sup>2</sup>

Judge Story, in his work on Bailments,<sup>3</sup> does not refer to this rule as growing out of the law of average. It is believed to be a question of apportionment or division, not of contribution. The word average in the law of insurance is applied to cases in which there is no contribution as well as to those in which contribution or average of the loss exists.<sup>4</sup>

In a cause of collision in which one of the vessels

<sup>1</sup> Code de Commerce, art. 407, Pardessus Cours de Droit Commercial, vol. iii. p. 88, § 652.

<sup>2</sup> *The Sapphire*, 18 Wall. 51; *The North Star*, 106 U. S. 17.

<sup>3</sup> § 608.

<sup>4</sup> Thus particular loss is called particular average in adjustments, where the loss is payable by only one interest, and as such losses are considered under the law of average which ascertains what items are to be averaged or not, the claims which are excluded from contribution are spoken of as average losses equally with those which are to be paid in general average.

was totally lost, and the personal liability of the owners thereby extinguished, a cross libel was filed against the owners of the vessel lost who had sued the surviving vessel *in rem*, and both vessels were held to be in fault. The owners of the vessel lost claimed to avoid the apportionment of damages on the ground that by the loss of their vessel their liability ceased,<sup>1</sup> and sought to recover one-half of the value of their vessel without deduction of one-half of the loss sustained by the other. The damages were, however, apportioned in the same manner as if the vessel had survived. The losses suffered by each vessel were added together and divided, and a decree given in favor of the owners of the vessel sunk for half the difference between their respective losses. The court refused to follow the English cases in which the English procedure in admiralty causes, by reason of the technicalities, produces results which differ from the original maritime rule. In the case of *Chapman v. The Royal Netherlands St. Nav. Co.*,<sup>2</sup> the Chancery Division was applied to for a limitation of liability by the English owners of the *Savernake* under a decree in the admiralty in a cause of collision with

<sup>1</sup> *Limitation of Liability of Ship-owners, post*, ch. v.

<sup>2</sup> *The North Star*, 106 U. S. 17.

<sup>3</sup> L. R. 4 P. D. 157.

the *Vesuvius*, a Dutch steamer, in which both vessels were adjudged to be in fault. Jessel, M. R., directed each to recover one-half of the loss, the moiety of the loss suffered by the *Savernake*, which was 4000£, to be deducted from the moiety recovered by the *Vesuvius*, which was 28,000£. The law of apportionment, in his opinion, is tersely stated thus: "When two ships come into collision, and both are in fault, one or the other can recover damages, and only one of the two, because the result of the action is that either the plaintiff or the defendant is to win something. That is the meaning of it. The consequence of the collision is that damage being done to one or both vessels, the owners of one vessel can recover something from the other. The admiralty rule in such a case is to take the amount of damage done to each vessel, to add them together, and to halve the amount, so that each owner is *inter se* to bear half, and then to ascertain who is to pay to the other, and the monition finally issues for the balance. That is all that is ever recovered in the action. That is the substance of it. The one party who wins, recovers from the other party who loses, damages by reason of the collision."<sup>1</sup>

<sup>1</sup> By the decree of the Master of the Rolls the *Vesuvius* was entitled to claim against the fund amounting to 5200£, paid in by the owners of the *Savernake* under the limitation of value based

As between two vessels in collision it is provided by Rule 53 whenever a cross libel is filed upon any claim arising out of the same cause of action, the libellant in the original suit and respondent in the cross libel is required to give security to respond in damages as claimed in the cross libel, unless for cause, the court shall otherwise direct, and all proceedings are stayed upon the original libel until such security is given. The cross libel can only be filed against the original parties, and cannot add as respondents others than those in the original libel.<sup>1</sup>

upon tonnage, the moiety of the loss suffered by their vessel 14,000£ less 2000£ the moiety of the Savernake's loss, resulting in a decree for 12,000£, to be paid *pari passu* out of the fund with the other claimants, the owners of and underwriters on cargo on board the Vesuvius. He was reversed on appeal, Brett, L. J., however, concurring with the Master of the Rolls, and the order was made directing the Vesuvius to claim for 14,000£, and refusing to recoup the damages decreed to be paid to the Savernake, so that the latter recovered its moiety in full from the Vesuvius, and the Vesuvius a dividend on its loss, out of a limited fund. The opinion of Jessel, M. R., was approved by the Supreme Court, U. S., in *The North Star*, 106 U. S. 17, and has since been sustained by the House of Lords in 7 App. Cases, 795.

<sup>1</sup> *The Ping-On v. Blethen*, 11 Fed. Rep. 607, *Empresa Maritima a Vapor v. The N. & S. Am. St. Nav. Co.*, 16 Fed. Rep. 502. A claim for salvage services rendered to a vessel disabled by a collision is held not to be the subject of a cross libel in the suit for a

Independently of proceedings by a cross libel, the damage suffered by both vessels in collision are adjudicated in the same cause, where no cross libel has been filed; or the cross libel has been filed, and been dismissed, in cases where both vessels were found to be in fault: provided the existence of damage to the vessel sued is set up in the answer. The claimant may be allowed to amend his answer after decree, so as to obtain contribution for his damages in the decree in favor of libellant,<sup>1</sup> but no affirmative damages can be awarded to the respondent unless he has filed a cross libel,<sup>2</sup> and an answer is not the proper means of claiming such affirmative damages.<sup>3</sup>

§ 81. Lord Stowell states four possibilities under which a collision may occur: "In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other *vis major*. In that case, the misfortune must be borne by the party on whom

collision by the latter vessel; *Crowell v. The Theresa Wolf*, 4 Fed. Rep. 152.

<sup>1</sup> *The Pennsylvania*, 12 Blatch. 67; *The Dove*, 91 U. S. 381; *The North Star*, 106 U. S. 17; *The Morning Light*, 2 Wall. 550; *The Sapphire*, 18 Wall. 51; *The Hudson*, 15 Fed. Rep. 162.

<sup>2</sup> *The Reuben Dowd*, 3 Fed. Rep. 520.

<sup>3</sup> *Chamberlain v. Ward*, 21 How. 548.

it happens to light; the other not being responsible to him in any degree.

“Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of due diligence or of skill on both sides. In such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them.

“Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burden.

“Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other.”<sup>1</sup>

Where the fact is clear that a fault has been committed, the law is settled that the owners of the ship and the ship itself by whose fault the damage arises must suffer the loss and answer for the damage to the other ship and her cargo, or bear the loss suffered by their own ship, and answer the damage to the cargo laden on board it if the ship which suffers is alone in fault.<sup>2</sup> And where loss arises by pure accident or peril of the sea, the rule

<sup>1</sup> The *Woodrop-Sims*, 2 *Dodson*, 83, affirmed in *Hay v. Le Neve*, 2 *Shaw's Scotch App. Cases*, 395.

<sup>2</sup> *Story on Bailments*, § 608 and *Bell's Comm.* vol. i. 579.

is equally clear that it falls where it lights.<sup>1</sup> But by the general maritime law, which differs from the Roman law, where both vessels are in fault the loss is divided between the two ships.<sup>2</sup>

Lord Stowell mentions only four of the possibilities under which collisions may occur; he does not notice a fifth referred to by Mr. Bell; viz., inscrutable fault, in which the codes of maritime nations more nearly agree that the damages shall be divided than in the case of mutual fault. That is where there is fault, but the fault is inscrutable; that is to say, where the loss was not caused by pure accident, or a peril of the sea, but by fault, but the evidence fails to disclose which vessel was in fault.<sup>3</sup> In an early case, *The Scioto*,<sup>4</sup> Judge Ware expressed the opinion, that if the collision happens without fault of either party, or if there was fault, and it cannot be ascertained which vessel was in fault, the loss and damage are to be equally divided, and the rule was applied to a case of inscrutable fault in *The Nautilus*.<sup>5</sup>

Mr. Bell, in his Commentaries, writes, "It is in the

<sup>1</sup> Bell's Comm., vol. i. p. 580.

<sup>2</sup> *The Woodrop-Sims*, 2 Dodson, 83. The rule as laid down by Lord Stowell, was adopted into the admiralty law of the United States, in the case of *The Catharine*, 17 How. 170.

<sup>3</sup> Bell's Comm., vol. i. p. 580.

<sup>4</sup> *Daveis*, 359.

<sup>5</sup> 1 Ware (2 ed.), 529.

case which lies between these two extremes that the main difficulty is found, for the resolution of which, rules so different have been resorted to. This is the case where both parties are to blame, or where there is some neglect or fault which is inscrutable. By the maritime law this is a case of average loss, or contribution," . . . . "and the point is, whether it be not consistent with equity and expediency that the contribution or average of such a misfortune in the case of inscrutable fault, as well as the case of obvious fault on both sides, shall comprehend both ships to equalize the loss, as if all were embarked on the same bottom."<sup>1</sup> Mr. Bell states that, by the law of Scotland, the damages are to be apportioned, in such cases, and that the Laws of Oleron, and those of Wisbuy, the Code of the Hanse Towns, the Ordonnance de la Marine of Louis XIV. and the Code de Commerce are to the same effect.

The reason quoted from Cleirac is that the presumption arises that both are blamable, and the justification unsatisfactory.<sup>2</sup> The nations which

<sup>1</sup> Bell's Comm., vol. i. 581.

<sup>2</sup> The rule of the general maritime law apportioning the loss in case of mutual fault is not derived from the civil law, which agreed with the common law in not allowing a party to recover for the negligence of another, where his own fault has contributed to the accident; 1 Bell's Comm. p. 580; Abbott on Shipping, p. 229;



have adopted this rule, generally, but not univer-

Wharton on Negligence, § 300. The law of France appears to follow the civil law. Code de Commerce, Art. 407. "En cas d'abordage de navires, si l'événement a été purement fortuit, le dommage est supporté sans répétition, par celui des navires qui l'a éprouvé. Si l'abordage a été fait par la faute de l'un des capitaines, la dommage est payé par celui qui l'a causé. S'il y a doute dans les causes de l'abordage, le dommage est réparé à frais communs, et par égale portion, par les navires que l'ont fait et souffert. Dans ces deux derniers cas, l'estimation du dommage est fait par experts." In inscrutable fault, it appears to divide the loss and not in case of mutual fault. Pardessus, Cours de Droit Commercial, vol. iii. p. 88, § 652. Ordonnance de la Marine, Articles X. and XI., 2 Peters, Ad. App. 37. The quotation from Grotius, book ii. ch. 17, cited by Mr. Bell, "*Propter bonum publicum et culpæ probandæ difficultatem*," would not apply to mutual fault; but only to the case of inscrutable fault. The rule in inscrutable fault is said to be derived from motives of public policy, in order to render masters more careful; *The Scioto*, Daveis, 359. According to Cleirac, "this rule of division is a rustic sort of determination, and such as arbiters and amicable compromisers of disputes commonly follow, where they cannot discover the motives of parties, or where they see fault on both sides, this impeaches neither the justice nor the expediency of the rule," Bell's Comm. p. 581. Lord Denman, in *De Vaux v. Salvador* (4 Ad. & Ellis, 420), said that the rule grew out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it; he refused to allow the portion of the loss of another ship in collision assessed against the insured vessel in excess of the latter vessel's damage in the apportionment of damages, as a charge against the

sally, divide the loss, where there is no fault on the part of either vessel.<sup>1</sup>

Such a rule applies the same presumptions which arise between a carrier and its cargo, as to which the carrier is an insurer, to a question of negligence between strangers, and there is inconsistency in refusing the cargo contribution from both vessels, as it appears the courts which adopt this rule do, in such cases of inevitable fault, and confining contribution to the ships alone.<sup>2</sup>

In a case of collision arising on the lakes, Hall, D. J., held that the damages were to be apportioned in case of inscrutable fault.<sup>3</sup> His opinion was that the American writers on maritime law, without exception, accept the rule of division of damages in inscrutable fault. Although this principle is supported in other cases cited in his learned

underwriters on the latter. The rule, however, is approved by Abbott (*Abb. on Shipping*, 233); by Kent (3 *Kent's Com.* 233), and has, by act of parliament, been adopted into the common law of England, in collisions at sea; Maude & Pollock, *Merchant Shipping*, 4th ed., p. 631.

<sup>1</sup> See *The Worthington and Davis*, 19 Fed. Rep. 836; *Story on Bailments*, §§ 608, 609; see Hall, D. J., in *The Comet*, 1 *Abb.* at 458.

<sup>2</sup> *Bell's Comm.*, vol. i. p. 578. *Pardessus, Cours de Droit Commercial*, § 652.

<sup>3</sup> *The Comet*, 1 *Abb.* 451.

opinion;<sup>1</sup> yet in a later case, *Blatchford, J.*, held that "the question is not settled for this court, and I am free to adopt what I believe to be the proper rule, namely, that, where the libellant does not establish fault in the vessel sued, such vessel must be allowed to depart from court without being mulcted in any amount, no matter whether the court concludes that the collision was the result of inevitable accident, or of some fault that is inscrutable; and that it is only when the vessel sued is affirmatively and specifically held to be in fault, either solely or jointly with some other vessel, that she can be condemned in any damages."<sup>2</sup> Dr. Lushington, in *The Maid of Auckland*,<sup>3</sup> in addressing the Trinity Masters, directed them that, in case they could not tell which vessel was to blame, both the libel and cross-libel must be dismissed.<sup>4</sup>

§ 82. This view is sustained by all principles of

<sup>1</sup> *The Nautilus*, 1 Ware, 529; *The Swan*, 6 McLean, 282; s. c. Newb. 158; *Jarveis v. The State of Maine*, 36 Hunt's Mer. Mag. 326.

<sup>2</sup> *The Breeze*, 6 Ben. 14; see also *The Worthington and Davis*, 19 Fed. Rep. 836.

<sup>3</sup> 6 Notes of Cases, 240.

<sup>4</sup> See also *The Catharine of Dover*, 2 Hagg, 145; *The City of London*, Swaby, 245; *The Grace Girdler*, 7 Wall. 196; *The Kallisto*, 2 Hughes, 128; *The Summit*, 2 Curtis, 150; *The Cherokee*, 2 Sprague, 235.

adjudication in causes of collision. The liability of a ship in a cause of collision is treated like that of an individual. No presumption arises from the happening of a collision against either vessel, until a breach of some positive precaution or regulation is shown to have been committed by one of the vessels. It is a question of fact which is to be proved affirmatively by the party alleging fault in the other.<sup>1</sup>

The mere fact that a ship strikes or goes foul of another creates no liability against herself, her owner, or those in charge of her; nor does it advance the case to assert that one ship "ran down" the other, or ran into her.<sup>2</sup> By the American law the liability of a ship in a cause of collision is treated like that of an individual, and in order that damages may be recovered, such fault must be proved as would render the owners or those on board the ship if sued responsible.<sup>3</sup> What degree of fault entitles the plaintiff to recover is difficult

<sup>1</sup> *The L. P. Dayton*, 18 Blatch. 411; *The Florence P. Hall*, 14 Fed. Rep. 408; *The David Dows*, 16 Fed. Rep. 154; *The Negaunee*, 20 Fed. Rep. 918; *The Adriatic*, 17 Blatch. 176. This case was affirmed in 107 U. S. 512.

<sup>2</sup> *The Morning Light*, 2 Wall. 550; *The Florence P. Hall*, 14 Fed. Rep. 408; *The James Watt*, 2 Wm. Rob. 270.

<sup>3</sup> *The Ann Caroline*, 2 Wall. 538; *The Scotia*, 14 Wall. 170; *The Illinois*, 103 U. S. 298; *The Free State*, 91 U. S. 200.

or impossible to define; apart from the particular circumstances in each case the question does not admit of an answer.<sup>1</sup>

§ 83. The burden of proof is on the plaintiff, but it does not follow that it lies upon him throughout the whole case. Frequently, by proving certain circumstances, the burden of proof is thrown on the defendant. Thus, in a collision between a steamship and a sailing vessel, on proof that the sailing vessel obeyed the regulations and held her course, the obligation of the steamship being, under the rules, to keep out of the way, the defence of inevitable accident must be proved by the steamer.<sup>2</sup> And in the same manner where there has been a breach of the statutory regulations as to lights exhibited by one vessel, she is *prima facie* in the wrong,<sup>3</sup> and the burden of proof is on that vessel to show that the infringement of the regu-

<sup>1</sup> Marsden on Collisions, 2; The Bolina, 3 Notes of Cases, 208; The Carron, 1 Spinks, 91; The London, 11 Moo. P. C. C. 307; The Marpesia, L. R. 4 P. C. 212; The Benmore, L. R. 4 A. & E. 132; The Abraham, 28 L. T. (N. S.) 775; The Albert Edward, 44 L. J. Adm. 49.

<sup>2</sup> The Carroll, 8 Wall. 302; The Scotia, 14 Wall. 170; The New York, &c. Mail S. S. Co. v. Rumball, 21 How. 372; The Florence P. Hall, 14 Fed. Rep. 408; The Franconia, 3 Fed. Rep. 397.

<sup>3</sup> The Gray Eagle, 9 Wall. 505; Chamberlain v. Ward, 21 How. at p. 567; The Narragansett, 11 Fed. Rep. 918; The Eleanora, 17 Blatch. 88; The Roman, 14 Fed. Rep. 61.

lation did not contribute to the collision, and, unless such fact is incontestably established, the failure to comply with the rule will render the vessel liable.<sup>1</sup> The same rule applies where a sailing vessel fails to blow a horn in a fog. It must show affirmatively that the horn if blown would have produced no effect.<sup>2</sup> But the failure of one vessel to comply with a statutory regulation does not discharge the other from the duty to take reasonable and practicable precaution to avoid a collision.<sup>3</sup> And the absence of a look-out properly stationed forward, always insisted upon as a measure of proper precaution, will not render a vessel liable for a collision when the other vessel was perceived in time, and the collision could not be attributed to the absence of the lookout at that place.<sup>4</sup>

<sup>1</sup> *The Pennsylvania*, 19 Wall. 125; *The Eleanora*, 17 Blatch. 88; *The Roman*, 14 Fed. Rep. 61; *The Narragansett*, 11 Fed. Rep. 918; *The Pennsylvania*, 12 Fed. Rep. 914; *The Excelsior*, 12 Fed. Rep. 195.

<sup>2</sup> *The Leo*, 11 Blatch. 225.

<sup>3</sup> 1 Pars. on Shipping, 192 n. 8; *Chamberlain v. Ward*, 21 How. at p. 567; *The Gray Eagle*, 9 Wall. 505; *The Continental*, 14 Wall. 345; *The Sunnyside*, 91 U. S. 208; *The City of Washington*, 92 U. S. 31; *Swift v. Brownell*, 1 Holmes, 467.

<sup>4</sup> *The Morning Light*, 2 Wall. 550; *The Fannie*, 11 Wall. 238; *The Farragut*, 10 Wall. 334; *The Annie Lindsley*, 104 U. S. 185-191; *The George Murray*, 22 Fed. Rep. 117.

Unless, therefore, the court finds facts from which the law presumes negligence or fault in the vessel impleaded, no decree can be rendered against the vessel.<sup>1</sup>

In a case very difficult of decision arising out of a collision between a steamship and a sailing vessel at night, by which the sailing vessel was destroyed and all on board perished, so that no testimony could be obtained from those on board, the Circuit Court of New York,<sup>2</sup> Waite, C. J., says: "It is impossible to tell with certainty how the vessels came together. The ship came and went in a comparatively short time, and necessarily in the midst of great excitement. Almost every witness has his own peculiar theory. Hardly any two of the large number of diagrams in the record, representing what the observers think they saw, agree in the material points, and it would be a useless task to attempt now to ascertain just how the damage was done." In refusing the libel, he concludes: "I place the decision entirely on the ground, that, upon the case as it stands, the steamer is free from blame."<sup>3</sup>

<sup>1</sup> *The Sun Mutual Ins. Co. v. The Ocean Ins. Co.*, 107 U. S. 485.

<sup>2</sup> *The Adriatic*, 17 Blatch. 176; affirmed 107 U. S. 512.

<sup>3</sup> This case falls nearly within the category of inscrutable fault, if not of inevitable accident. In a previous part of the decision

On the other hand, where the duty of the steamship, or of a sailing vessel, having the wind free, to avoid another, is shown to exist; or a sailing vessel bound to keep her course, fails to do so, in respect to an approaching vessel, the presumption of fault arises, and such vessel is bound to satisfy the court that the collision was not occasioned by such breach of the sailing rules.<sup>1</sup>

§ 84. In a question of dividing the damages, it has been said that the degree of culpability of each vessel will be considered, and where the fault is slight on the one hand, and grave on the other, the damages will not be divided. But it is not the highest degree of culpability which is necessarily followed by the gravest consequences, and the later decisions do not seem to examine into the degrees of fault, where both are contributory to the collision.<sup>2</sup> Flagrant fault in one vessel will not excuse the other from taking proper precau-

the court says: "I have been unable to reach any other conclusion than that the fault of the Adriatic has not been shown."

<sup>1</sup> *The Carroll*, 8 Wall. 302; *The Scotia*, 14 Wall. 170; *The N. Y. &c. Mail S. S. Co. v. Rumball*, 21 How. 372; *The Roman*, 14 Fed. Rep. 61; reversing same case, 12 Fed. Rep. 219; *The Eleanora*, 17 Blatch. 88.

<sup>2</sup> *The Atlas*, 93 U. S. 302; *Hay v. Le Neve*, 2 Shaw's Scotch App. Cases, 395; *The Washington*, 5 Jurist, 1067; *The Milan*, *Lushington*, 388; *The Linda*, 4 Jurist (N. S.), 146.



tions to avoid a collision, and the failure so to act will render the vessel not originating the collision, liable for the result, and entail equally on it the consequences of a collision, and the damages are divided equally between both vessels without regard to the degree of culpability.<sup>1</sup>

But such rules of liability as that of "*levissima culpa*" are inapplicable to a question of collision, in which the use of inventions entailing a new peril to life and property is allowed, because compensated for by the greater convenience and safety of the community, and the only restraint is the rule that the use must be reasonable.<sup>2</sup>

The fact that a mistake is made in the movement of a vessel does not necessarily imply that there is fault as a matter of law. Those charged with the duty of directing the movement of vessels are required to have the necessary skill and to exercise good judgment. "They need not be infallible." It is enough if they do what others, having the requisite skill, and placed in a like

<sup>1</sup> The *Maria Martin*, 12 Wall. 31; The *Franconia*, 16 Fed. Rep. 149; The *Pegasus*, 19 Fed. Rep. 46; *contra*, in a late case, the *Mary Ida*, 20 Fed. Rep. 741, the damages were apportioned according to the disparity of the fault.

<sup>2</sup> The *Grace Girdler*, 7 Wall. 196; The *Austria*, 14 Fed. Rep. 298; The *Nevada*, 106 U. S. 154.

situation, would ordinarily have done,<sup>1</sup> and, therefore, a mistake committed in moments of impending peril of collision, produced by the fault of another, does not render the vessel liable.<sup>2</sup>

§ 85. Where the loss happens without fault on either side, "it falls where it lights," as in case of loss by the perils of the sea,<sup>3</sup> where a vessel by the violence of a storm drags its anchors and damages another.<sup>4</sup> This class of cases comes within the category of inevitable accident.

Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances, such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view, the safety of life and property.<sup>5</sup>

The term "inevitable accident" is not, therefore, to be confounded with *vis major*. In the absence

<sup>1</sup> Waite, C. J., in *The Adriatic*, 17 Blatch. at p. 194; *The John Stuart*, 4 Blatch. 444.

<sup>2</sup> *The Jupiter*, 1 Ben. 536; *The Belle*, *ibid.* 317; *The Santiago de Cuba*, 10 Blatch. 444.

<sup>3</sup> Story on Bailment, § 610; 1 Bell's Comm. 579-82.

<sup>4</sup> *The John Perkins*, 21 Law Rep. 87.

<sup>5</sup> *The Grace Girdler*, 7 Wall. 196.

of proof of want of ordinary proper care and caution, an accident comes into the former category, although if every possible contingency had been foreseen, it might have been guarded against.<sup>1</sup> Thus, where two vessels failed to see each other at night, both having a competent lookout, it was held to be conclusive evidence of absence of fault in either, and to be inevitable accident.<sup>2</sup> In *The Java*,<sup>3</sup> a schooner came suddenly out from behind an old-fashioned line of battle-ship, which concealed her, in Boston harbor, and was run down by the *Java*, which was passing the battle-ship; this was held to be a case of inevitable accident.<sup>4</sup>

The failure of a vessel to slip its cable as to a vessel adrift, was held to be an inevitable accident.<sup>5</sup> And so where a vessel broke loose from her fastenings at a wharf, which were those usually employed and found sufficient.<sup>6</sup> And errors occasioned by natural causes are not faults as coming within this category; as "the best-known precautions which

<sup>1</sup> *The Morning Light*, 2 Wall. 550.

<sup>2</sup> *Stainback v. Rae*, 14 How. 532; *Peck v. Sanderson*, 17 How. 178.

<sup>3</sup> 14 Wall. 189.

<sup>4</sup> See also *The Southern Home*, 16 Blatch. 447; *The Fashion*, 1 Newb. 8; *The Merrimac*, 14 Wall, 199.

<sup>5</sup> *The John Perkins*, 21 Law Rep. 87.

<sup>6</sup> *The Austria*, 14 Fed. Rep. 298.

experience has suggested or the law provided may at times fail of securing safety.”<sup>1</sup>

Dr. Lushington’s definition of inevitable accident<sup>2</sup> is that usually adopted: “Inevitable must be considered as a relative term, and must be construed not absolutely, but reasonably, with regard to the circumstances of each particular case. In the strict sense of the term there are very few cases of collision that can be said to be inevitable, for it is almost always possible, the bare possibility considered, to avoid such an occurrence. It was possible in this case, by going at a slower pace, or lying to during the fog. But the import of the words ‘inevitable accident’ in my view, is this: where a man is pursuing his lawful avocation in a lawful manner, and something occurs which no ordinary skill or caution could prevent, and, as the consequence of that occurrence, an accident takes place. Now, it is very easy to define what is a lawful avocation; but it is not so easy to say what is a lawful manner.”

On this principle, defence of inevitable accident is sustained in England where there was no *vis major*.<sup>3</sup> But a failure to make allowance for room

<sup>1</sup> The *Negaunee*, 20 Fed. Rep. 918; The *Lepanto*, 21 Fed. Rep. 651.

<sup>2</sup> The *Europa*, 14 Jurist, 627, s. c. 2 E. L. & Eq. R. 557.

<sup>3</sup> The *Thornley*, 7 Jurist, 659; The *Peerless*, 13 Moore, P. C. C. 484; The *John Buddle*, 5 Notes of Cases, 387.

to pass a vessel ahead, which grounded on the bar of the Mississippi, was held not to be an inevitable accident.<sup>1</sup>

A vessel is not bound to foresee every possible contingency, and where it is pursuing its avocation in a lawful manner, it is not bound to take measures of precaution, which perhaps an over-prudent man would take in view of a possibility of avoiding the possible consequences of a deviation of the other vessel from the rule.<sup>2</sup> It is required to use such precautions as are usual to prevent danger, and a failure to do so, or the assuming of a needless hazard will render the vessel liable,<sup>3</sup> but while the *prima facie* duty of avoiding a collision rests on the vessel having the wind free, such a vessel is not treated as a guarantor against collision.<sup>4</sup>

§ 86. In collisions occurring where one of the vessels is in charge of a towboat, the question is one of fact, whether the fault was on the part of the towboat or of the tow. The tug is not a common carrier nor an insurer as such of the safety of the tow.<sup>5</sup> Nor is the relation between the vessels

<sup>1</sup> The Merrimac, 14 Wall. 199.

<sup>2</sup> The Scotia, 14 Wall. 170 ; The Illinois, 103 U. S. 298 ; The Free State, 91 U. S. 200 ; The Mary Eveline, 16 Wall. 348.

<sup>3</sup> The Merrimac, 14 Wall. 199 ; The Venture, 18 Fed. Rep. 462.

<sup>4</sup> The Mary Eveline, *supra*.

<sup>5</sup> The Webb, 14 Wall. 406 ; The Princeton, 3 Blatch. 54 ; The

that of master and servant, so as to render the tow liable for the acts of the tug.<sup>1</sup>

*New Philadelphia*, 1 Black, 62; *The Mosher*, 4 Biss. 274; *The Thomas Kiley*, 5 Ben. 301; *Caton v. Rumney*, 13 Wend. 387; *Alexander v. Greene*, 7 Hill (N. Y.), 533.

<sup>1</sup> The contract of towage is a bailment by which the services of the tug are engaged to expedite the voyage. It is not attended with the liabilities of a carrier, and the tug is excused from the further performance of its contract when that becomes inconsistent with its own safety; *The I. C. Potter*, L. R. 3 A. & E. 292; *Sonsmith v. The J. P. Donaldson*, 21 Fed. Rep. 671, per Mathews, J. The relation between the two vessels is not that of master and servant; *The James Gray v. The John Frazer*, 21 How. 184; *Sturgis v. Boyer*, 24 How. 110; *The Clarita and The Clara*, 23 Wall. 1; *The Galatea*, 92 U. S. 439. Owners of each vessel and the vessels themselves are responsible for the acts of their own servants, and the liability is adjudicated accordingly; *The Alabama and The Gamecock*, 92 U. S. 695; *The Galatea*, 92 U. S. 439. The obligation of the vessel owners is to employ a tug of proper power for the purpose, but they do not constitute the master and crew of the tug their agents, as they cannot appoint the mate or crew, nor displace them; *The Galatca*, 92 U. S. 439. So that on damage occurring to the tow or to a third vessel, the liability of the tug and its tow will be ascertained according to the fault of the vessel which occasioned the damage, and the rule is to apportion the damage between the tug and the tow where both are in fault; *The Mabey and Cooper*, 14 Wall. 204; *The Civilta and The Restless*, 103 U. S. 699; *The Atlas*, 93 U. S. 302. When a pilot is taken on board the ship he is the agent of the ship, not of the tug; *ibid.* The rule of dividing the loss is applied to actions of tort brought against the tug by its tow for negligence in towing, and the dam-

In *Smith v. The Creole*,<sup>1</sup> it was held that the remedy of the third party was always to be en-

ages are divided in case of mutual fault; *The Quickstep*, 9 Wall. 665; *The J. L. Hasbrouck*, 5 Ben. 244; *ibid.* 6 Ben. 272; *The William Murtagh*, 3 Fed. Rep. 404; *The Workman*, 1 Low. 504; *Connolly v. Ross*, 11 Fed. Rep. 342; *The Bordentown*, 16 Fed. Rep. 270; and *The William Murtagh*, 17 Fed. Rep. 259. While in the common law courts, the negligence of those in charge of the tow, if contributory, prevents a recovery; *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 470; *Silliman v. Lewis*, 49 N. Y. 379; *Milton v. The Hudson River S. B. Co.*, 47 N. Y. 210.

Towboats are not common carriers, nor insurers, they are bound to use reasonable skill and care, and the want of either is fault, which renders the tug liable to the full extent of the damage; *The Webb*, 14 Wall. 406; *The Princeton*, 3 Blatch. 54; *The New Philadelphia*, 1 Black, 62; *The Margaret*, 94 U. S. 494. This renders the owners responsible for accidents, the result of want of proper knowledge of the difficulties of navigation; *The Lady Pike*, 21 Wall. 1; *ibid.* 96 U. S. 461; *The Margaret*, 94 U. S. 494.

Although the towboat is not a common carrier, and the tow is not in the exclusive charge of the tug, the master of the tug, when several vessels, having no motive power of their own, are in tow, is responsible for the arrangement of the tow, and of the sufficiency of the tow lines; *The Quickstep*, 9 Wall. 665; *The Margaret*, 94 U. S. 494; *Transportation Line v. Hope*, 95 U. S. 297; *Alexander v. Greene*, 3 Hill (N. Y.), 9; *The Bordentown*, 16 Fed. Rep. 270; and assumes to determine the character of the weather in which he can safely proceed in reference to the character and condition of the tow, and is liable for going out in hazardous weather; *The William Murtagh*, 3 Fed. Rep. 404; *The Margaret*, 94 U. S. 494;

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<sup>1</sup> 2 Wall., Jr., 485, followed in *The Samson*, 3 Wall., Jr., 14.

forced against the vessel; as the tug is the servant of the vessel and bound to obey the orders of

*The Merrimac*, 2 Sawyer, 586; *The William Murtagh*, 17 Fed. Rep. 259.

In actions for negligent towage, the burden of proof is on the libellant; *The Princeton*, 3 Blatch. 54. A contract to tow at the risk of the owners does not exempt the tug from proper and reasonable care and skill, the absence of which is negligence; *The Princeton*, *ante*; *The Syracuse*, 6 Blatch. 2. Whether it could stipulate for such exemption from all liability is undecided; see also the *James Jackson*, 9 Fed. Rep. 614. The principle of apportioning the damages is applied in actions for a breach of duty in towage resulting in collision with another vessel, and also in a loss of the tow by mismanagement in the navigation. In such cases the action is not on the contract, but on the duty arising from entering upon performance under a contract to tow; *The M. J. Cummings*, 18 Fed. Rep. 178; *The J. L. Hasbrouck*, 5 Ben. 244; s. c. 6 Ben. 272; *The William Murtagh*, 3 Fed. Rep. 404; *The Workman*, 1 Low. 504; *Connolly v. Ross*, 11 Fed. Rep. 342; *The Bordentown*, 16 Fed. Rep. 270; *The Liberty No. 4*, 7 Fed. Rep. 226. And the same rule was said to apply in an action by the shipper of cargo by a barge against the tug employed, where the loss was attributable to the unskilful navigation by the tug, and also the unseaworthiness of the barge, if the shipper had knowledge of the insufficiency of the vessel employed by him; *The William Murtagh*, 17 Fed. Rep. 259. As between the shipper and his own vessel it is doubtful whether the policy of the law would allow the carrier to defend against the warranty of seaworthiness on the ground of the shipper's knowledge; see *The Regulus*, 18 Fed. Rep. 380. Cargo injured by a collision, arising from the contributory negligence of its own vessel and another, recovers in



the master; and if the master chooses to follow the pilot or steersman of the tug and trust to his skill instead of his own, the acts of the pilot may be considered as his own and adopted by him.<sup>1</sup> The Supreme Court, however, held that such was not the relation of the two vessels, but that towage is a bailment by which one vessel hires another to accelerate its speed, or to furnish motive power, and that each vessel has its own duties to perform by its own crew, and that by employing a tug, the owners of the tow do not necessarily constitute the master of the tug their agent; but the master of the tug continues to be the agent of the owners of his own vessels, who are alone responsible for his acts in the course of her navigation with a tow.<sup>2</sup>

full; *The Alabama* and *The Gamecock*, 92 U. S. 695. A vessel in tow does not participate in a salvage service performed by the tug in the course of the voyage; *The Ephraim and Anna*, 21 Fed. Rep. 346; *The Mary E. Long*, 7 Fed. Rep. 364; *The Sarah*, L. R. 3 P. D. 39. In a late case it is held that a voluntary sacrifice of vessels in tow, having no motive power of their own, which are solely in charge of the master of the tug as bailee, is to be compensated for in general average; *Sonsmith v. The J. P. Donaldson*, 21 Fed. Rep. 671. When towage becomes salvage, note p. 45.

<sup>1</sup> See, also, *Reeves v. The Constitution*, Gilpin, 579; *The Merimac*, 2 Sawyer, 586.

<sup>2</sup> *The James Gray v. The John Frazer*, 21 How. 184; *Sturgis v. Boyer*, 24 How. 110; *The Clarita and The Clara*, 23 Wall. 1; *The Galatea*, 92 U. S. 439; *The Civiltà and The Restless*, 103 U. S. 699; *The Ephraim and Anna*, 21 Fed. Rep. 346.

This question of liability in collision is, therefore, adjudicated by determining whether the collision was the fault of the servants of the tug or of the tow. And in case both vessels are found in fault the damages are apportioned between them; as in the case of collision between two independent vessels.<sup>1</sup>

The right of the tow to recover for a collision caused by the concurrent negligent act of its tug and of another vessel, like that of the cargo on board of a vessel injured by collision, caused by the negligence of two vessels, is by a libel against both or either one of the two vessels in fault. The owner of the tow may resort to either one of the offending vessels and recover for his whole loss,<sup>2</sup> or recover his whole loss from both vessels;<sup>3</sup> in the latter case the decree is not *in solido* against both vessels for the damages, but a decree is made apportioning the loss between the two vessels.

Where a vessel is lashed alongside of a tug, and

<sup>1</sup> The Mabey and Cooper, 14 Wall. 204; The Civilta and The Restless, 103 U. S. 699.

<sup>2</sup> The Atlas, 93 U. S. 302; The Franconia, 16 Fed. Rep. 149. As to the right of the vessel sued to take proceedings to bring the other vessel into adjudication, see The Hudson, 15 Fed. Rep. 162, *post*.

<sup>3</sup> The Alabama and The Gamecock, 92 U. S. 695; The Washington and The Gregory, 9 Wall. 513.

is dependent for its movements solely on the tug itself, the whole responsibility is, as a rule, on the tug.<sup>1</sup> But it is otherwise where a pilot is on board, engaged by the ship; the direction of the course of the vessel is then under the control of the ship's pilot.<sup>2</sup> Whenever a tug undertakes to transport a vessel which has neither officers nor crew on board, she becomes alone responsible for the proper navigation of both vessels where damage is occasioned to another vessel,<sup>3</sup> assuming always that the tug employed is suitable for the duty she is engaged to perform, or at least that negligence is not imputable to the owners of the tow, on the ground that the tug employed by them was unsuitable, and therefore unseaworthy for the purpose of its employment.<sup>4</sup>

But where a vessel is towed astern, and the officers of both vessels participate in the navigation, the liability of the vessel is then determined according to the faults of the respective crews,

<sup>1</sup> *Dutton v. The Express*, 3 Cliff. 462; *The Merrimac*, 2 Sawyer, 586; *The Olive Baker*, 4 Ben. 173; *The J. H. Gautier*, 5 Ben. 469.

<sup>2</sup> *The Merrimac*, 14 Wall. 199.

<sup>3</sup> *The Maria Martin*, 12 Wall. 81; *The Mabey and Cooper*, 14 Wall. 204; *Sturgis v. Boyer*, 24 How. 110.

<sup>4</sup> *Sturgis v. Boyer*, *ante*.

and the tug or the tow may be held solely liable, or jointly, as the fault may be shown to exist.<sup>1</sup>

While both the tug and her tow are regarded as one steam vessel with regard to their duty to a sailing vessel,<sup>2</sup> the duty of the vessel in tow is to watch the motions of its tug, and a failure to do so will render the tow solely responsible for the collision.<sup>3</sup>

In the towage of a fleet of barges and canal boats, the latter, however, are considered solely in charge and under the control of the officers of the tug, and the latter is liable for damages by collision as regards the vessels in tow, unless she can show it was not occasioned by her fault; as the duty of making up the tow, to arrange the vessel properly, and to see that the lines are sufficient and securely fastened, is on the tug, so that in an injury to one barge by reason of a collision with another in the same tow, occasioned by the parting of lines, the liability is primarily on the tug.<sup>4</sup> And in such contracts of towage the relation of the vessel in tow to the tug employed has

<sup>1</sup> *The Civiltà and The Restless*, 103 U. S. 699; *The Maria Martin*, 12 Wall. 31; *Sturgis v. Boyer*, 24 How. 110; *The Syracuse*, 12 Wall. 167; *Dutton v. The Express*, 3 Cliff. 462.

<sup>2</sup> *The Cleadon*, Lush. 158.

<sup>3</sup> *The Maria Martin*, 12 Wall. 31.

<sup>4</sup> *The Quickstep*, 9 Wall. 665; *New York v. Rea*, 18 How. 223; *The Express*, 1 Blatch. 365; *The Niagara*, 20 Fed. Rep. 152.

been treated the same as that of the cargo to its vessel, so that a voluntary sacrifice of the tow by the master of the tug, who ordered the tow lines to be cast off in a storm, by which means the latter was preserved in a case of common peril, gave rise to a claim of general average for the vessel sacrificed.<sup>1</sup>

A pilot employed by the vessel being towed is bound to give directions to the tug, and his failure to direct the tug will render his own vessel liable for a collision;<sup>2</sup> although his failure to do so will not absolve the tug if, by an independent

<sup>1</sup> The *J. P. Donaldson*, 21 Fed. Rep. 671, reversing the same case in 19 Fed. Rep. 264. Mr. Justice Matthews applies this rule to the case in point; that of vessels in tow having no motive power of their own where the master of the tug has the sole control, and upon whom all the duties in relation to towage devolves, and where the tug cannot abandon its contract. In the latter instance the relation between the tug and its tow does not assume that the master cannot in a proper case abandon his contract to "expedite" the voyage of the vessel towed and become a salvor, which is inconsistent with such a community of interest in the undertaking as would give rise to the claim for general average; *The Minnehaha*, Lush. 335; *The Galatea*, Swabey, 349; *The I. C. Potter*, L. R. 3 A. & E. 292. Vessels being towed are decided not to be entitled to participate in salvage awarded to the tug; *The Ephraim and Anna*, 21 Fed. Rep. 346.

<sup>2</sup> *The Merrimac*, 14 Wall. 199; *The Civilta* and *The Restless*, 103 U. S. 699; *The Energy*, L. R. 3 A. & E. 47; *Spaight v. Tedcastle*, L. R. 6 App. Cas. 217.

motive power of that vessel, the collision could have been avoided.<sup>1</sup>

§ 87. These rules of liability growing out of agency apply only to actions of tort between strangers and where no contractual relation exists.

Where a carrier is sued for loss of cargo by reason of a collision with another vessel, the fact that the collision was caused by the negligence of a tow boat employed by the carrier, will not discharge the carrier from liability arising from such a cause. He is liable as bailee for the shipper, and is responsible for the safety of the goods while in transmission, whether in his own charge or that of a carrier employed by himself.<sup>2</sup>

§ 88. While in relation to the contracts and obligations of the master and its internal police, the vessel is in many respects considered a portion of the territory of the nation to which it belongs; yet the high seas are free and open to all the world, and the laws of every state or nation have there a full and perfect operation upon the persons and property of the citizens, subjects of such a state or nation.<sup>3</sup> But as the admiralty exercises jurisdiction over foreign vessels in causes of collision oc-

<sup>1</sup> *The Civilta and The Restless*, 103 U. S. 699.

<sup>2</sup> *Sun Mutual Ins. Co. v. The Miss. Valley Transp. Co.*, 17 Fed. Rep. 919.

<sup>3</sup> 1 Kent's Comm. p. 26.

curring on the high seas, the question what law is to be applied in such causes between vessels of different nationalities cannot be solved by the law of the flag, and it has been attended with difficulties arising from the variety of the laws governing the vessels, and also from doubts as to how far the laws of a country extend over particular parts of the sea lying within the limits of the jurisdiction of a nation.

The law governing collisions or other maritime torts, where the occurrence is on the high seas or on waters not within the jurisdiction of a nation, will be found in the following decisions:—

In the early case of *Smith v. Condry*,<sup>1</sup> which was a suit at common law in the courts of the United States, growing out of a collision which occurred between two American vessels on the river Mersey and port of Liverpool, the vessel in fault was in charge of an English pilot; and, as under the interpretation by the English courts of their statutes relating to the pilotage of that port,<sup>2</sup> the master or owner of a vessel trading to or from the port of Liverpool was not answerable for a collision occasioned by the faults of a pilot compulsorily taken by the laws governing that port; the

<sup>1</sup> 1 How. 28.

<sup>2</sup> The Liverpool Pilot Act, 37 Geo. III. c. 78.

English law was held to govern the liability of the owners of the vessel in a suit instituted in the courts of the United States.

In the subsequent case of *The China*,<sup>1</sup> the same law was applied, but producing the opposite result under the American law as to the liability of a vessel for a collision, while in charge of a pilot. An English steamship while in charge of a New York pilot came into collision with an American vessel by reason of the fault of the pilot, the collision occurring outside of Sandy Hook but on pilotage grounds. The court held that although the employment of the pilot in charge was compulsory under the laws of New York, yet as the American tribunals did not, according to their decisions, relieve either the vessel or the owners<sup>2</sup> from responsibility for a collision occasioned by the negligence of a pilot so employed and whom the laws governing the port imposed upon the vessel, the steamship was liable.

The English admiralty followed the same rule in *The Halley*,<sup>3</sup> which was a case of collision oc-

<sup>1</sup> 7 Wall. 53.

<sup>2</sup> *Bussy v. Donaldson*, 4 Dall. 206; *Williams v. Price*, 4 Martin (N. S.), 399; *Yates v. Brown*, 8 Pick. (Mass.) 23; *Denison v. Seymour*, 9 Wend. 1; *Smith v. The Creole*, 2 Wall., Jr., 485.

<sup>3</sup> L. R. 2 A. & E. 3. Sir Robert Phillimore expressed his regret that the construction of the English act freed the vessel



casioned by a British vessel in Belgian waters, where pilotage is compulsory ; but where the law of the port did not for that reason exempt the vessel or the owner from responsibility for the fault of the pilot in charge. The case of *Smith v. Condry*<sup>1</sup> was cited and followed in determining that the liability of parties for a tort was to be governed by the law of the place where the damage was occasioned.

The case was reversed by the judicial committee on the ground that for a tort committed in a foreign country the party claiming reparation in a British court cannot claim the benefit of the foreign law and obtain a remedy in respect of damages for an act for which the British law imposes no liability on the person from whom the damages are claimed.<sup>2</sup>

These decisions are shown in the case of *The Eagle*<sup>3</sup> to be governed by a principle peculiar to the pilotage system, which creates regulations of the port into which a vessel enters when bound to or departing from the port; and which do not govern the law in collisions occurring on the high seas or on waters within the littoral jurisdiction of a nation, between vessels not bound to a port of

from responsibility for damages while in charge of a pilot occasioned by his fault.

<sup>1</sup> 1 How. 28.

<sup>2</sup> *The Halley*, L. R. 2 P. C. 193.

<sup>3</sup> 8 Wall. at p. 22.

the jurisdiction.<sup>1</sup> The opinion in this case shows that the principle on which *The China*<sup>2</sup> was decided is that the statutes of New York in relation to pilotage come within the category of port regulations which the state may enact, and which are always with us compulsory; and that a foreign vessel seeking a port voluntarily enters into the sphere of their operation, and becomes liable according to the law of the place.<sup>3</sup>

In the case of *The Eagle*<sup>4</sup> the collision occurred

<sup>1</sup> *Queen v. Keyn*, L. R. 2 Exch. Div. 63; *The Twee Gebroeders*, 3 C. Rob. 336; *The Saxonia*, Lush. 410; *The Thebes*, 12 Hunt's Mer. Mag. 82.

<sup>2</sup> 7 Wall. 53.

<sup>3</sup> The same view of the effect of the English pilotage laws was taken by Dr. Lushington in the *Annapolis*, Lush. 355, where an American vessel bound to the port of Liverpool, while in charge of an English pilot, was held not to be responsible for a collision with a Prussian vessel arising out of the fault of the English pilot. The pilot was taken on board on the high seas, and the exemption under the English pilotage act was extended to a vessel receiving a pilot under such circumstances, if bound to an English port. The same principle is reaffirmed in *Wilson v. McNamee*, 102 U. S. 572, where a vessel bound to New York was held liable for pilotage services tendered by a New York pilot-boat and refused on the high seas, because the pilot-boat carried with her the laws of the port, and the tender was effectual if made to a vessel bound to the port by which the pilot-boat was licensed. Wharton's Commentaries on American Law, § 424, and note as to pilotage cases, p. 101.

<sup>4</sup> 8 Wall. 15.

by the fault of a tug, having an American vessel in tow in the Detroit River on the Canadian side. The tug was proceeded against *in rem* in the American admiralty. The defence set up to the jurisdiction *in rem* was that as the collision occurred on Canadian waters, the Canadian law applied, and as by that law no lien was given against the injuring vessel, the court could not proceed *in rem* for a collision in Canadian waters. The court sustained the right to proceed *in rem* in the American admiralty in accordance with the American law of collision, and explained the case of *Smith v. Condry*<sup>1</sup> as being applicable to vessels in charge of a pilot of the port to the laws of which the vessel had become subject by her entry.

§ 89. It follows from this case that in collisions occurring in waters, which are within the territorial jurisdiction of a nation for some purposes, the laws of the place of collision do not govern unless in the exceptional instance of vessels becoming subject to the law of the place by voluntarily entering into its ports, and thus becoming subject to its local laws.

The territorial jurisdiction of a nation over waters within its jurisdiction, and within the three mile zone of the shore, does not extend to vessels

<sup>1</sup> 1 How. 28. It applies equally to the case of *The China*, 7 Wall. 53.

using the ocean as a highway, and not bound to a port of the nation.<sup>1</sup> And a vessel may pass in its voyage along the shore of another nation without subjecting itself to the law of the littoral sovereign, and retain all the rights given by the law of its flag.

This authority or claim of jurisdiction over the ocean within the three mile zone of the coast, is said and shown by Lord Chief Justice Cockburn<sup>2</sup> to be a shrinkage of the claim of jurisdiction over the *mare clausum* which was never acknowledged and is now abandoned, and to exist only for the protection and defence of the coast and its inhabitants.<sup>3</sup>

Mr. Webster, in his letter to Lord Ashburton, quoted in Wheaton's Law of Nations,<sup>4</sup> says: "A

<sup>1</sup> The Saxonía, Lush. 410; The Twee Gebroeders, 3 C. Rob. 336; Queen v. Keyn, L. R. 2 Exch. Div. 63.

<sup>2</sup> Queen v. Keyn, L. R. 2 Exch. Div. at 159.

<sup>3</sup> The opinion of Cockburn, Ch. J., contains citations from many foreign authorities, including American writers and decisions. The decision of Marshall, Ch. J., in Church v. Hubbart, 2 Cr. 165, and that of Story, J., in The Ann, 1 Gall. 62, enforcing the embargo against vessels which had come within the three mile zone of the coast of the United States, are shown to be consistent with the principle on which the jurisdiction exists. See also The Twee Gebroeders, 3 C. Rob. 336, and The Saxonía, Lush. 410, as to captures made within the three mile zone.

<sup>4</sup> Page 723.

vessel on the high seas, beyond the distance of a marine league from the shore, is regarded as part of the territory of the nation to which she belongs, and subjected, exclusively, to the jurisdiction of that nation. If against the will of her master, or owner, she be driven or carried nearer to the land, or even into port, those who have, or ought to have, control over her, struggling all the while to keep her upon the high seas," she remains "within the exclusive jurisdiction of her government."<sup>1</sup>

This was written in the case of the *Creole*, an American vessel, carried into Nassau, by persons who had been slaves in Virginia. The same reason which governs in the case of a vessel driven by weather or by violence within the three mile jurisdiction, applies to a vessel the necessities of whose voyage compel her to pass within the same zone.<sup>2</sup>

In torts thus occurring on the high seas or on waters which are considered as a highway of nations, although within the jurisdiction of a government, it becomes a difficult question to determine

<sup>1</sup> Webster to Ashburton, Aug. 1, 1842.

<sup>2</sup> See the passage in *Church v. Hubbart*, 2 Cranch, at p. 174, where Marshall, C. J., shows the necessity of a very restrictive jurisdiction as to the trade to the north of Europe through the narrow sea under the English jurisdiction. The trade to and from North Europe passes within the littoral jurisdiction of the English law in passing through the English channel.

how far the municipal law of the forum enters into the consideration of the obligations of vessels of other nationalities.<sup>1</sup>

§ 90. Although the law of the sea is said to be a part of the international law of the world, and the admiralty is said to apply to actions *ex delicto*, the rules which the principal maritime nations of the world apply in the place where the cause of action originated, yet the sailing rules to avoid collisions, and the character of the lights required to be exhibited, are all creatures of the municipal law, upon which there is not an entire agreement among maritime nations.<sup>2</sup>

§ 91. The question presented has received different treatment in the courts of the United States and of England, although the divergence has ceased by reason of parliament giving the same effect to its rules as to foreigners as has been arrived at by the decisions of the Supreme Court of the United States.

In a collision on the high seas between a British

<sup>1</sup> *The Eagle*, 8 Wall. 15 ; *The Saxonia*, Lush. 410.

<sup>2</sup> *The Scotland*, 105 U. S. 24. Independently of statute there is no law which requires a vessel to exhibit a light; *The Louisiana v. Fisher*, 21 How. 1 ; *The Hypodame*, 6 Wall. 216. Although a vessel could not recover if the absence of such light caused the collision, or the exhibition of one would have prevented it; *Peck v. Sanderson*, 17 How. 178.

and a Prussian vessel, Dr. Lushington says:<sup>1</sup> "When a collision takes place between a British and a foreign vessel on the high seas, what law shall a court of admiralty follow? As regards the foreign ship, for her owner cannot be supposed to know or to be bound by the municipal law of this country, the case must be decided by the law maritime, by those rules of navigation which usually prevail among nations navigating the seas where the collision takes place. . . . Then comes the question whether, in a trial of the merits of a collision, a foreigner may urge in his defence that the British vessel, though free by the law maritime, has violated her own municipal law, and so, being plaintiff, cannot recover? Reverse the position: suppose the foreigner plaintiff, and to have done his duty by the law maritime. I am clear that he must recover for the damage done; if so, it is contrary to equity to say that the British shipowner, *in eadem conditione*, shall not recover against the foreigner."

The same rule was so affirmed in *The Saxonia*,<sup>2</sup> and where a steam vessel belonging to Hamburg had run down an English vessel; and in another case, when the registrar's report as to the amount of damages was objected to on the ground that

<sup>1</sup> *The Zollverein*, Swabey, at p. 99.

<sup>2</sup> *Lush.* 410.

the amount of damage as reported exceeded the value of the ship and freight, to which by the English statute the liability of the shipowners was limited, Lord Stowell held that the rule of the English statute was one of domestic policy, and that it applied only to cases where the advantages and disadvantages were common to vessels of both nations.<sup>1</sup>

§ 92. This question received the consideration of the Supreme Court and a different result was arrived at in the case of *The Scotia*<sup>2</sup> in a collision upon the high seas between a British steamship and an American vessel. The American vessel was found to be in fault, partly upon the ground that she had violated the law of her country in the character of her lights, and also because the lights to be carried by steamers and sailing vessels to distinguish them had by the general consent of maritime nations become a part of the law of the sea. The language of the court in this decision by Strong, J., on the growth of the maritime law with regard to the usages of the sea, is: "The question still remains, what was the law of the place where the collision occurred, and at the time when it occurred. Conceding that

<sup>1</sup> The *Carl Johan* referred to in *The Girolamo*, 3 Hagg. 183-186; see, also, *The Nostra Signora de los Dolores*, 1 Dods. 291.

<sup>2</sup> 14 Wall. 170.



it was not the law of the United States, nor that of Great Britain, nor the concurrent regulations of the two governments, but that it was the law of the sea, was it the ancient maritime law,<sup>1</sup> that which existed before the commercial nations of the world adopted the regulations of 1863 and 1864, or the law changed after those regulations were adopted? Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single

<sup>1</sup> But what that law is, is very difficult of determination, it is only the law of the court in which the remedy is sought. *The Scotland*, 105 U. S. 24; *The Gaetano and Maria*, L. R. 7 P. D. 137.

state, which were at first of limited effect, but which when generally accepted became of universal obligation.

“The Rhodian law is supposed to have been the earliest system of marine rules. It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalphitan table, of the ordinances of the Hanseatic League, and of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in council of January 9th, 1863, and in our acts of congress of 1864, accepted as obligatory rules by more than thirty of the principal commercial states of the world, including almost all which have any shipping on

the Atlantic Ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision of which the libellants complain took place. This is not giving to the statutes of any nation extra-territorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice."<sup>1</sup>

In this case the American vessel was condemned because the lights carried were not in conformity with those required by the American act of 1864, the lights required to be exhibited by the American law being in conformity with those required by the English regulations. And an American vessel was condemned for not showing a lighted torch to an approaching English steamer at night, under the circumstances required by the statutes of the United States,<sup>2</sup> although the English law has no such express provision.<sup>3</sup>

<sup>1</sup> The opinion quoted at length shows such a general adoption of the same lights as amounted to an international system.

<sup>2</sup> Rev. Statutes, 4234.

<sup>3</sup> *The Sarmatian*, 2 Fed. Rep. 911; see *The Golden Grove*, 13 Fed. Rep. 700; *The Oder*, 13 Fed. Rep. 272; *The Milanese*, 43 L. T. (N. S.) 107; affirmed 45 L. T. (N. S.) p. 157.

It was also said, when the rules prescribed by the municipal law of the two vessels are in conflict, then each vessel must obey the rule prescribed by the government to which she belongs.

It is in this respect that the rule laid down by the Supreme Court of the United States differs from that of the English admiralty as expressed in *The Zollverein*<sup>1</sup> and followed in *The Saxonia*.<sup>2</sup> Both were cases of collision occurring at night between English and foreign vessels, and in neither case could the nationality of the vessels have been known to the other, and the British statutes were held not to be binding on their vessels in collisions with foreign vessels.<sup>3</sup>

<sup>1</sup> Swabey, 96.

Lush. 410.

<sup>2</sup> In *The Saxonia*, Lush. 410, the English vessel's side-light was obscured, and a flash-light was exhibited to the steamer only when the collision was "inevitable or nearly so;" and under § 298 of the Merchants' Shipping Act, the English vessel could not have recovered in a collision with a vessel of the same nation. *The Zollverein* was also a collision at night.

In both these cases the element was wanting which, under the American rule in *The Scotia*, might have altered the result as to the English vessel; there was nothing to show that the municipal law of the foreign vessel differed from the English law, and that the observance of the regulations of her government by the English vessel would have misled the foreign vessel; or that any knowledge existed of the nationality of the foreign vessel which would justify the breach of the English law by the English vessel. Such a breach of a positive precaution under the general law of negligence

The rule in *The Scotia*<sup>1</sup> is further modified as to collisions on the high seas, by the case of *The Scotland*,<sup>2</sup> in which a British vessel was libelled in the Admiralty Court for the Southern District of New York, for a collision with an American vessel. The owners of the British vessel sought the protection of the American statute exempting them from all liability on the subsequent loss of their vessel, arising from the same collision, and obtained it on the ground that the law of the forum governed collisions on the high seas, except where the two colliding vessels belong to the same country, or, perhaps, to vessels of different nationalities, where the same law applied and was different from the law of the forum. It was considered that a party seeking redress in the admiralty courts of this country, seeks the protection of the maritime law as administered in these courts, whether adopted from the general maritime law or by statute, and in this respect is in accordance with the views of the Judicial Committee of the Privy Council.<sup>3</sup>

could in no case be justified, although the failure to observe an artificial rule of the road, the general observance of which by vessels of all nationalities only would tend to diminish collisions, might be.

<sup>1</sup> 14 Wall. 170.

<sup>2</sup> 105 U. S. 24.

<sup>3</sup> *The Amalia*, Brown & Lush. 151; *The Vernon*, 1 Wm. Rob. 316.

§ 93. It is now authoritatively settled by the court of the highest resort in the United States, that the maritime law as administered in the courts of the United States, will govern in all causes in those courts when arising or growing out of torts occurring on the high seas, and not within the jurisdiction of any one nation, where the rights of foreigners are involved,<sup>1</sup> except perhaps in such exceptional cases as where the tort is between vessels of the same nationality, or between vessels of different nationalities, whose laws are the same, and different from those of the United States, in which case the foreign law will be applied.<sup>2</sup>

And, in a case of salvage services rendered by a British vessel to a Dutch vessel at sea, the District Court of the United States refused to consider the commercial code of the Netherlands as applying to such case, but adjudicated the cause by the general maritime law as administered in the American courts.<sup>3</sup>

This rule, like that of the law of the flag,<sup>4</sup> is one most practicable of administration if the court

<sup>1</sup> *The Scotland*, 105 U. S. 24; *The Scotia*, 14 Wall. 170; *Thommasen v. Whitwill*, 12 Fed. Rep. 891.

<sup>2</sup> *The Scotland*, 105 U. S. 24.

<sup>3</sup> *Anderson v. The Edam*, 13 Fed. Rep. 135.

<sup>4</sup> *Ante*, § 38, p. 109.

accepts, as it must of necessity, jurisdiction of causes in which foreign ships are concerned.<sup>1</sup>

In the absence of any general maritime law binding everywhere on all nations, the court must apply its own law of negligence to dispose of the controversy, giving weight to the municipal law of other nations where the same law governs the duty of both vessels.<sup>2</sup> In collisions occurring within the jurisdictional waters of other countries, the same rule governs;<sup>3</sup> excepting where a vessel is entering or leaving the port of another nation, in charge of a pilot imposed by the laws of the port, in which case it becomes subject to the port regulations and the laws governing the locality of the port.<sup>4</sup>

A distinction will probably be found between suits instituted on behalf of a foreign vessel, and suits in which such a vessel is brought *in invitum*; in the former case, the owner submits to be adjudicated by the laws of the forum, and the rules which govern the question of liability. In the latter case, no such supposition exists, and where

<sup>1</sup> See Story, J., in *The Jerusalem*, 2 Gall. 191.

<sup>2</sup> *The State of Alabama*, 17 Fed. Rep. 847.

<sup>3</sup> *The Eagle*, 8 Wall. 15; *The Halley*, L. R. 2 P. C. 193; *The Amalia*, Br. & Lush. 151; *Queen v. Keyn*, L. R. 2 Ex. Div. 63.

<sup>4</sup> *Smith v. Condry*, 1 How. 28; *The China*, 7 Wall. 53; *The Merrimac*, 14 Wall. 199; *The Annapolis*, Lush. 355. This principle was not recognized in *The Halley*, L. R. 2 P. C. 193.

such a vessel has complied with its own municipal law, it can hardly be treated as in fault under the municipal law of the forum, where such law differs from its own.<sup>1</sup>

A serious question arises whether a foreign vessel could be condemned in any court for following the laws of its own nationality.<sup>2</sup> And the English cases which hold that the breach of its statutory regulations by an English vessel sued for a collision with a foreign vessel will not be considered in the question of its liability, as such regulations of themselves were not binding on foreigners, sustain the view that it cannot.<sup>3</sup>

By the Merchants' Shipping Act of 1862, which went into effect in 1863, it was provided that the government of any foreign state might assent to the regulations, and consent to their application to the ships of such states, and that thereupon the

<sup>1</sup> *The Scotia*, 14 Wall. 170; *The Montana*, 17 Fed. Rep. 377. The American law of negligence was held to govern in the case of a British vessel stranded on the coast of Wales, on a voyage from New York to Liverpool. The bill of lading stipulated for exemption from liability for negligence of the defendant's servants. As the contract was to be performed on the high seas by a British vessel, the contract was valid or otherwise according to the law of the flag, which is notice to the shipper that such shipment is made under the law of England. See Wharton's *Conflict of Laws*, §§ 471-472 *a*.

<sup>2</sup> *The Scotia*, 14 Wall. 170.

<sup>3</sup> *The Zollverein*, *Swabey*, 96; *The Saxonia*, *Lush*. 410.



Queen, by an order in council, might direct that such regulations should apply to ships of such foreign state when within or without British jurisdiction. The act further provided that whenever an order in council should be issued applying any regulations made under it to the ships of any foreign country, such ships, in all cases arising in British courts, should be deemed to be subject to such regulations, and for the purpose thereof be treated as British ships.

The rules respecting lights were adopted by nearly all the nations of the world.<sup>1</sup> The rules provided by the act of congress of 1864 in respect to lights and sailing rules are, in nearly all respects, similar to the regulations under the British statute, and the laws of both countries are generally applicable to collisions at sea between vessels of those two nations and between those of other nations which have adopted the English sailing rules.<sup>2</sup>

<sup>1</sup> Holt's Rule of the Road, p. 2.

<sup>2</sup> The United States refused to be bound by what is called the International Rule of the Road, except as to vessels of the United States navy. The reader is referred to an article in *The International Review* for April, 1883, "Safety of Life at Sea," by Captain J. W. Shackford, p. 291, giving the difference between the international code adopted by the principal nations of the world, for steamers, and those in force in the United States. See recommendation on the subject by President Arthur, in his last annual message, Dec. 1884.

## CHAPTER V.

PROCEEDINGS TO LIMIT THE LIABILITY OF  
SHIP-OWNERS.

The statute derived from a general rule of the maritime world, § 94.	parties not suing in the admiralty, § 100.
Jurisdiction vested in the District Courts, § 95.	What losses the statute extended to, § 101.
Rules of practice of the Supreme Court U. S. regulating proceedings, § 96.	What voyages come within the statute, § 101.
Early construction of the act limited to value before collision, § 97.	What must be surrendered, § 102.
Subsequently to value after collision, § 98.	Where proceedings may be instituted, § 103.
Rules not intended to confine owners to such proceedings, § 99.	Foreigners may obtain limitation, § 104.
Proceedings must be taken to bind	Does not extend to implied warranty of seaworthiness, § 105.
	Whether subsequent loss of vessel is a discharge of personal liability, § 106.

§ 94. THE jurisdiction to limit the liability of ship-owners conferred upon the District Courts under the act of congress of March 3, 1851, reproduced in the Revised Statutes, §§ 4282-4289, was regulated by the admiralty rules of the Supreme Court of the United States.<sup>1</sup>

This act of congress was said in *Moore v. The American Trans. Co.*,<sup>2</sup> to have been designed "to

<sup>1</sup> Rules 54-58.

<sup>2</sup> 24 How. 1-39.

promote the building of ships, and to encourage persons engaged in the business of navigation, and to place that of this country upon a footing with England and on the continent."

The reason given by Grotius for this limitation of liability is that "men would be deterred from owning and operating ships if they were subject to the fear of an indefinite liability for the acts of the master."<sup>1</sup>

Late acts of parliament have modified the law of England, so that the maritime law of the United States, as found in the statutes, differs from that of Great Britain in this, that the former gauges the liability by the value of the ship and freight after loss or injury, and the latter by their value before the loss or injury not exceeding 15£ per ton.<sup>2</sup>

The act not only exempts the owner from the casualty of fire, but limits his liability in cases of embezzlement, loss, or destruction of goods on board, by the master, officers, etc., and also for the loss or damage from collision, and from any loss or damage occurring without the privity or knowledge of the owner to an amount not exceeding the value of the vessel and freight.<sup>3</sup> And the

<sup>1</sup> *Jure B. & P.*, lib. 2, c. 11, § 13; *The Scotland*, 105 U. S. 24; *Norwich Co. v. Wright*, 13 U. S. 104.

<sup>2</sup> *The Scotland*, 105 U. S. 24; *The Benefactor*, 103 U. S. 239.

<sup>3</sup> *Moore v. The Am. Trans. Co.*, 24 How. 1.

Supreme Court holds that, so far as this statute limits the liability of the ship-owner for the torts of the master and crew upon the surrender of the vessel and her pending freight, the rule of the statute was the general rule of the maritime world,<sup>1</sup> and adopts the views of Judge Ware, as expressed in the case of *The Rebecca*,<sup>2</sup> that "The general sense of the commercial world seems to be satisfied with holding the owners of vessels responsible to the extent of their interest in the ship, and by abandoning the ship and freight to the creditors, they are discharged. This has, for a long time, if I am not mistaken, been the law of all maritime nations of the continent of Europe, with regard to damages arising from the wrongful and illegal act of the master. It has, however, never been acknowledged in England or in this country, though it seems the sense of the commercial community is in favor of this limitation of the owner's responsibility for the tortious act of the master."<sup>3</sup>

<sup>1</sup> *Norwich Co. v. Wright*, 13 Wall. 104; *The Scotland*, 105 U. S. 24.

<sup>2</sup> 1 Ware, 188.

<sup>3</sup> The rule of the maritime law thus recognized by the Supreme Court of the United States is also recognized by the legislation of many foreign countries, viz., Portugal, Holland, Hamburg, Denmark Code of 1683, Sweden and Norway, Ordinance of 1667,

The civil law, like the common law, made the owner responsible to the whole extent of the damage.<sup>1</sup>

§ 95. The rule of the maritime nations of the world has, by statute, become that administered by the courts of the United States,<sup>2</sup> and it is decided that this statute, enacted under the commercial clause of the constitution in giving the ship-owner a right to take appropriate proceedings in any court to enforce his claim for limitation of liability, by necessary implication, gave him the right to take these proceedings in the District Courts of the United States, which are vested with exclusive jurisdiction in all maritime and admiralty causes, saving to suitors in all cases a common law remedy where the common law is competent to give it. The District Courts are alone held to be those competent to exercise the

Russia, the Two Sicilies, Malta, in the Lombards, the Venetian Kingdom, Sardinia, the countries governed by the Ordinance of Bilbao; that is, Mexico and the Republics of South America, and by Prussia. See *Norwich Co. v. Wright*, 13 Wall. 104; *Moore v. Am. Trans. Co.*, 24 How. 1; *Thomassen v. Whitwill*, 12 Fed. Rep. 891.

<sup>1</sup> *Norwich Co. v. Wright*, 13 Wall. at p. 116; see, also, *In re Long Island Trans. Co.*, 5 Fed. Rep. 599; *Maclachlan on Merchant Shipping*, 109.

<sup>2</sup> *Norwich Co. v. Wright*, 13 Wall. 104.

full jurisdiction over such cases; because the causes are maritime in their nature, and the relief to be given is not a remedy which the common law is competent to give.<sup>1</sup>

The grounds upon which this exercise of admiralty jurisdiction by the District Courts is upheld, is that congress has adopted a rule of the maritime law, applicable to the commerce of the United States, over which its jurisdiction extends; that it has exercised this by limiting the redress against ship-owners, where the injury is not caused by the neglect of the ship-owners, to the value of the ship and the freight pending, and that by providing for the surrender of the vessel and freight by the owners, it has prescribed that the remedy shall be only *in rem* against the ship and freight, and not *in personam*.<sup>2</sup>

Such proceedings are treated substantially as a suit *in rem* against the vessel and its pending freight, to which all persons claiming for a loss are summoned in as parties, in order to give to the

<sup>1</sup> Ibid. *The Benefactor*, 103 U. S. 239; *In re Long Island Trans. Co.*, 5 Fed. Rep. 599.

<sup>2</sup> See Taney, C. J., in *The St. Lawrence*, 1 Black, at page 527, as to the right of congress to prescribe the modes and forms of proceedings in the tribunals it may establish to carry the judicial power into execution.

owners of the vessel the benefit of the provisions of the act of congress limiting their liability.<sup>1</sup>

The words of the Revised Statutes which have given rise to this branch of the admiralty jurisdiction are: "Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."<sup>2</sup>

"It shall be deemed a sufficient compliance on the part of such owner with the requirements of this title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any

<sup>1</sup> *In re Prov. & N. Y. S. S. Co.*, 6 Ben. 124.

<sup>2</sup> § 4284.

court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease.”<sup>1</sup>

§ 96. Rules have been adopted by the Supreme Court under its authority to regulate the practice in admiralty, by which the owner desiring to claim the benefit of the limitation of liability, provided in the 3d and 4th sections of the act of 1851, shall file “a libel or petition in the proper District Court of the United States,” and upon compliance with the order of the court for payment into court of the appraised value of the ship and freight, or for the transfer of the vessel to a trustee to be appointed by the court under the 4th section of said act, the court “shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post-office, or otherwise, as the court, in its

<sup>1</sup> § 4285.



discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims."<sup>1</sup>

Proofs of claims are to made before a commissioner of the court, and the proceeds are to be apportioned among the claimants according to their respective claims.<sup>2</sup>

§ 97. The entire change in the law of liability intended by this act was not accepted at once, although in an early case,<sup>3</sup> in an action by the freighters against the owners for loss of a shipment of gold arising from the wreck of the vessel on the coast of California through "the negligence, fraud, unfaithfulness, and malversation of the defendants, their officers, servants, and agents," the construction of this act by the court (Kane, J.,) was in accordance with the present decisions, that, by the loss of the vessel, the liability of the owners ceased, and that the policies of insurance on the vessel were independent subjects of property, which did not pass by surrender of the vessel, and were not required to be surrendered to the shippers to entitle the owners to the limitation of liability under the act.

<sup>1</sup> Adm. Rule 54.

<sup>2</sup> Adm. Rule 55.

<sup>3</sup> *Wattson v. Marks*, 2 Am. Law Reg. 157.

As able a judge as Mr. Justice Grier did not follow this interpretation of the act in a case of collision arising in the same district,<sup>1</sup> where the steamer whose fault occasioned the collision was also totally lost. He followed the English and Massachusetts decisions, and held that the liability of the owners did not cease by the loss of the vessel, but was limited to the value of the steamer at or immediately before the collision.<sup>2</sup>

It was also held in another circuit that the act of congress did not apply to injuries to other vessels caused by collision.<sup>3</sup>

§ 98. This question was, however, fully considered by the Supreme Court in *Norwich Co. v. Wright*.<sup>4</sup> The Circuit Court had held that injuries to other vessels and their cargoes were not embraced in the act of 1851; that the act was intended to apply only to the responsibility of owners, as carriers, to shippers and others in accordance with the decisions under the Massachusetts and English acts.<sup>5</sup>

<sup>1</sup> *Barnes v. The Winchester*, 25 Leg. Int. (Pa.) 196.

<sup>2</sup> *Walker v. The Ins. Co.*, 14 Gray, 288. See *Lord v. G. N. & P. S. Co.*, 4 Saw. 292; *Dobree v. Schroder*, 6 Simons, 291; *Wilson v. Dickson*, 2 B. & Ald. 2; *Brown v. Wilkinson*, 15 Meeson & Welsby, 391; *The Mary Caroline*, 3 Wm. Rob. 101.

<sup>3</sup> *In re Norwich & N. Y. Trans. Co.*, 17 Blatch. 221.

<sup>4</sup> 13 Wall. 104.

<sup>5</sup> *In re Norwich & N. Y. Trans. Co.*, 17 Blatch. 221; s. c., 10 Ben. 193.

The Supreme Court, however, on appeal, decided that the limitation of liability extended, 1st, To damages to goods on board the vessel lost;<sup>1</sup> 2d, To damages to other vessels and their cargoes; 3d, To any other damage or forfeiture done or incurred; 4th, That the lien for the damage done to the vessel, with which she collided, and her cargo was on an equality with those arising from the loss of the cargo of the steamer by the same cause;<sup>2</sup> 5th, That the liability of the owners of the vessel in fault was limited to the value of the vessel after the collision, and was extinguished by a total loss;<sup>3</sup> 6th, That the District Courts, as courts of

<sup>1</sup> This does not include a claim for freight prepaid, but not earned. *In re Liverpool & Great Western Steam Co.*, 3 Fed. Rep. 168.

<sup>2</sup> See *ante*, §§ 68 and 69, as to priority of liens.

<sup>3</sup> The construction of the English act and of the Massachusetts act only limited the personal liability of the owners to the value of the vessel at or just before the time of the collision. *Walker v. The Ins. Co.*, 14 Gray, 288; *Barnes v. The Winchester*, 25 Leg. Int. (Pa.) 196; *contra*, *Wattson v. Marks*, 2 Am. L. Reg. 157. But neither of these acts contained a provision for the surrender of the vessel and her freight under the statutes of the United States, which is in accordance with the Ordonnance de la Marine, Valin, Lib. 2, t. 8, art. 2. Pardessus, Cours de Droit Commercial, Part 3, t. 2, c. 3, § 2. It was aptly said, "If the privilege exists as long as there is anything left of the vessel to be transferred, it cannot cease when she is entirely destroyed. That would be to stand

admiralty, have jurisdiction, and are the proper courts to give relief to the owner; and that the owner may either plead in bar the fact that his liability has been limited in such proceedings in the state courts, or procure an order from the District Court to restrain the further prosecution of the suit; and in a later case that the refusal to allow effect to such an order by the state courts could be reviewed on a writ of error to the highest state court.<sup>1</sup>

§ 99. These rules were adopted for the purpose of formulating a proceeding which would give full protection to ship-owners; but they were not intended to prevent them from availing themselves of the limitation of liability by defence set up in the answer or plea in the cause, nor to restrict the owners to any particular mode of obtaining the protection of the statute, but to aid them in bringing into concourse all those having claims against them arising from the act of the master or crew.<sup>2</sup> It is not necessary that the ship-owner should surrender and transfer the ship in order to claim the benefit

upon too nice a piece of logic in giving a reasonable and practical construction to a statute." Per Bradley, J., in *Norwich Co. v. Wright*, 13 Wall. at 127.

<sup>1</sup> *Hill Mfg. Co. v. The Prov. & N. Y. Steamship Co.*, 113 Mass. 495; reversed in 109 U. S. 578.

<sup>2</sup> *The Scotland*, 105 U. S. 24.

of the law. He may plead his right to a limitation of liability under the statute in that cause, at the same time denying that his vessel was in fault, and may abide a decree for the value of the ship and freight as found by the proofs.<sup>1</sup> And the appraisal of the vessel, and stipulations given when attached, are sufficient to found proceedings to limit his liability in that action.<sup>2</sup> The final decree in such cause will be suspended until proceedings are taken to bring in all other parties having claims upon the vessel; the decree standing as the basis for the *pro rata* share in distribution of the funds.<sup>3</sup> If the ship-owner pleads the statute, a decree may be made requiring him to pay into court the limited amount for which he is liable, and for distributing such amount ratably among all the parties claiming damages. Such a proceeding would be appropriate in an admiralty court under the statute.<sup>4</sup> But in order to obtain such limitation as to other parties, where no suit has been brought in the admiralty, proceedings to

<sup>1</sup> *The Scotland*, 105 U. S. 24; *Norwich Co. v. Wright*, 13 Wall. 104; *Walker v. The Transportation Co.*, 3 Wall. 150; *The Benefactor*, 103 U. S. 239; *The Maria and Elizabeth*, 11 Fed. Rep. 520.

<sup>2</sup> *The Maria and Elizabeth*, 12 Fed. Rep. 627.

<sup>3</sup> *The Benefactor*, 103 U. S. 239.

<sup>4</sup> *The Scotland*, 105 U. S. 24.

limit their liability must be taken by the owners in the admiralty, accompanied by a surrender of the ship or freight, and an order obtained from the District Court restraining the further prosecution of such suits.<sup>1</sup>

The owners may contest their liability or that of the ship or vessel, and parties presenting claims may contest the owner's right to an exemption from or limitation of liability in such proceedings instituted in the District Courts.<sup>2</sup>

Since the adoption of the rules of the Supreme Court, the practice has been to institute a separate proceeding to obtain the benefit of the limitation of liability.<sup>3</sup>

§ 100. Although the exclusive jurisdiction of the admiralty in maritime causes arises only in proceedings *in rem*, and where a suit is brought in a state court having concurrent jurisdiction, such jurisdiction cannot be taken away by proceedings commenced in the federal courts;<sup>4</sup> since a suit *in*

<sup>1</sup> *Norwich Co. v. Wright*, 13 Wall. 104.

<sup>2</sup> Adm. Rule 56; *In re Prov. & N. Y. S. S. Co.*, 6 Ben. 258.

<sup>3</sup> *Thomassen v. Whitwell*, 9 Ben. 458; *The City of Norwich*, 1 Ben. 89; *Ibid.*, 6 Ben. 330; *The Epsilon*, 6 Ben. 378; *The Benefactor*, 9 Ben. 44; *Wright's Petition*, 10 Ben. 14; *The John Bramall*, 10 Ben. 495.

<sup>4</sup> *Taylor v. Carryl*, 20 How. 583; *Smith v. M'Iver*, 9 Wh. 532; *Wallace v. McConnell*, 13 Peters, 136.

*personam* is not a bar to a suit *in rem* inasmuch as the enforcement of a lien is not inconsistent with the assertion of the personal liability of the owners.<sup>1</sup> Yet all suits *in personam* must now be enforced consistently with the provisions of the act of congress limiting the liability of ship-owners; under the provisions of which a surrender of the vessel and her freight operates as a discharge of the owner's personal liability.<sup>2</sup>

It was decided in the Supreme Court of Massachusetts, that proceedings taken in the admiralty would not have the effect of preventing the state courts from taking jurisdiction, and of ousting that of the state courts in actions founded on the negligence of the owners.<sup>3</sup> The case, however, was considered on a writ of error in the Supreme Court of the United States, the judgment of the state court was reversed, and the order of the District Court in proceedings to limit the liability of the owners was held binding in proceedings in the state courts.<sup>4</sup>

<sup>1</sup> *Certain Logs of Mahogany*, 2 Sumner, 589; *The Prince Albert*, 5 Ben. 386; *The Tubal Cain*, 9 Fed. Rep. 834.

<sup>2</sup> *In re Prov. & N. Y. S. S. Co.*, 6 Ben. 124.

<sup>3</sup> *Hill Mfg. Co. v. The Prov. & N. Y. Steamship Co.*, 113 Mass. 495; *Hill Mfg. Co. v. The Prov. & N. Y. Steamship Co.*, 125 Mass. 292.

<sup>4</sup> *Prov. & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578.

While the words of the act would seem to limit any operation of the admiralty proceedings to causes not growing out of the default of owners, the spirit of the act requires that the rights of the ship-owners should be considered in one proceeding, and not left to the consideration of juries in as many trials as there are shippers; otherwise the right to a limitation would be destroyed.

There is a difficulty in applying such a restraining order to proceedings in the state courts under section 720 of the Revised Statutes, which reads: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."<sup>1</sup> Such orders have been upheld under the rules of the Supreme Court,<sup>2</sup> and, while the proceedings are pending in the District Court, and before a determination, the prosecution of suits in the courts of the state against the owners will be stayed.<sup>3</sup> And such an order can be pleaded in bar of proceedings in the

<sup>1</sup> *Hill Mfg. Co. v. The Prov. & N. Y. Steamship Co.*, 113 Mass. 495.

<sup>2</sup> *In re Prov. & N. Y. S. S. Co.*, 6 Ben. 124; *In re Long Island Transp. Co.*, 5 Fed. Rep. 599; see, also, *Bradley, J.*, in *Prov. & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. at p. 600.

<sup>3</sup> *The City of Columbus*, 22 Fed. Rep. 460.



state courts, and if due effect is not given to the allowance of such an order of the District Court, the proceedings can be examined by writ of error from the Supreme Court of the United States to the highest court of the state refusing to recognize its validity.<sup>1</sup>

In a late case,<sup>2</sup> the court refused to issue an injunction to the state courts pending an appeal from the Circuit Court denying a petition of owners to a limitation of their liability. It does not decide that an injunction cannot issue to the state court to stay proceedings, but only that the writ will not be issued pending an appeal.

Under this decision of the Supreme Court of the United States, the question whether the owners are entitled to a limitation of their liability as a bar to any other proceedings must be determined in those instituted by the owners in the admiralty when such proceedings are commenced.<sup>3</sup> Although in their absence the defence can be raised in the suit brought at law against the owners, or in the admiralty against the vessel.

§ 101. The owners are entitled to the limitation

<sup>1</sup> *Prov. & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578.

<sup>2</sup> *The Mamie*, 110 U. S. 742.

<sup>3</sup> *In re Long Island Transp. Co.*, 5 Fed. Rep. 599; *In re Prov. & N. Y. S. S. Co.*, 6 Ben. 124; *Briggs v. Day*, 21 Fed. Rep. 727.

of liability for personal injuries and damages for deaths,<sup>1</sup> but not for a claim of freight advanced but not earned.<sup>2</sup> The limitation of liability does not apply "to the owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation."<sup>3</sup> It extends to voyages on the high seas, although between ports of the same state;<sup>4</sup> on the great lakes,<sup>5</sup> and on Long Island Sound,<sup>6</sup> and even where the vessel ran between ports of the same state, but was in a line which formed a link in interstate commerce;<sup>7</sup> but does not apply to a vessel engaged in the trade on the Chesapeake Bay and the Delaware River through the Chesapeake and Delaware Canal,<sup>8</sup> or on the upper waters of the Missis-

<sup>1</sup> *In re Long Island Trans. Co.*, 5 Fed. Rep. 599; *The Epsilon*, 6 Ben. 378; *The City of Columbus*, 22 Fed. Rep. 460.

<sup>2</sup> *In re Liverpool and Great Western Steam Co.*, 3 Fed. Rep. 168.

<sup>3</sup> Rev. Stat. § 4289.

<sup>4</sup> *Lord v. Steamship Company*, 102 U. S. 541.

<sup>5</sup> *Moore v. The Am. Trans. Co.*, 24 How. 1; *Walker v. Trans. Co.*, 3 Wall. 150.

<sup>6</sup> *The Norwich Co. v. Wright*, 13 Wall. 104; *Wallace v. The Prov. & Ston. S. S. Co.*, 14 Fed. Rep. 56.

<sup>7</sup> *In re Long Island Trans. Co.*, 5 Fed. Rep. 599; *The Epsilon*, 6 Ben. 378.

<sup>8</sup> *Clyde v Graver*, 54 Penna. St. 251.

issippi.<sup>1</sup> But the exemption of liability is said to extend only to owners of vessels engaged in commerce, and not to a pleasure yacht, although duly enrolled under the navigation laws of the United States.<sup>2</sup>

§ 102. The value as increased by repairs placed on the vessel after the collision,<sup>3</sup> and insurance effected by the owners on the vessel lost are not brought into account, nor freight, where none is earned by reason of the loss of the cargo.<sup>4</sup> What is included in the appurtenances of a ship was discussed in *The Ontario*.<sup>5</sup> The outfit of a whaling vessel was held to be an integral part of the ship, which entered into its valuation, but it was excluded on appeal in the Circuit Court.<sup>6</sup> But a fund produced by a cause of damage *in rem* for the loss of the vessel by a collision would seem

<sup>1</sup> *The War Eagle*, 6 Biss. 364.

<sup>2</sup> *The Mamie*, 5 Fed. Rep. 813. An appeal is pending in this case.

<sup>3</sup> *Norwich Co. v. Wright*, 13 Wall. 104; *The Benefactor*, 103 U. S. 239.

<sup>4</sup> *In re Norwich & N. Y. Trans. Co.*, 17 Blatch. 221; *Watson v. Marks*, 2 Am. L. Reg. 157; *The St. Olaf*, L. R. 2 A. & E. 360; *The Ontario*, 2 Low. 40; *The City of Columbus*, 22 Fed. Rep. 460.

<sup>5</sup> 2 Low. at p. 50.

<sup>6</sup> *Swift v. Brownell*, 1 Holmes, 467; see, however, *Hill v. Patten*, 8 East, 373; *The Dundee*, 1 Hagg. 109.

to represent the vessel itself, and should be surrendered to enable the owner of the vessel to claim exemption from personal liability arising out of such collision;<sup>1</sup> otherwise, where both vessels are adjudged in fault, and one of the vessels is lost, the owners could recover half the loss of their vessel from the offending vessel, and escape all liability to the shippers of its cargo, and the vessel which survived would pay the whole loss on cargo, while the rule is that one-half of the loss of the cargo is to be deducted from the decree in favor of the carrier which was lost.<sup>2</sup>

This principle was carried into effect in *The North Star*,<sup>3</sup> which was a cause of collision in which one of the steamers, the *Ella Warley*, was sunk and the *North Star* damaged. The owners of the *Ella Warley* libelled the *North Star in rem*, and the owners of the latter filed a cross libel *in personam* against the owners of the *Ella Warley*. Both vessels were held to be in fault, and the damages were divided. The owners of the *Ella Warley* contended that by the loss of their vessel their liability had ceased, and that one-half of their damages was to be paid in full without any deduction for the

<sup>1</sup> *In re Leonard*, 14 Fed. Rep. 53.

<sup>2</sup> *The Farnley*, 8 Fed. Rep. 629. *The Eleanora*, 17 Blatch. 88; *The North Star*, 106 U. S. 17.

<sup>3</sup> 106 U. S. 17.

half damages sustained by the North Star. So that the owners of the Ella Warley would have obtained full compensation for a moiety of their loss, whilst the owners of the North Star would sustain both their own entire loss and half of that of the owners of the Ella Warley. The decision arrived at was that the statute of limitation did not apply until the balance of damages was struck in accordance with the usual rule of adding together the damage to both vessels and dividing the loss.<sup>1</sup>

The bond or stipulation for the appraised value, taken for the release of the vessel to the owners, takes the place of the *res*, but the owner's liability continues for interest and cost beyond the amount of the appraised value when he contests his liability, although it cannot be enforced against the sureties.<sup>2</sup> Leave was given the owners to pay the freight into court after a bond was given for the appraised value, without deciding what freight was pending where the claim was for a loss by jettison caused by reason of overloading.<sup>3</sup>

§ 103. Such proceedings may be instituted be-

<sup>1</sup> See opinion of Jessel, M. R., in *Chapman v. The Royal Netherlands St. Nav. Co.*, quoted at page 229, Chap. IV.

<sup>2</sup> *The Wanata*, 95 U. S. 600; *The Favorite*, 12 Fed. Rep. 213; *The Benefactor*, 108 U. S. 239; *The Palmyra*, 12 Wheat. 1; *The John Dunn*, 1 Wm. Rob. 160; *The Dundee*, 2 Hagg. 137.

<sup>3</sup> *Sumner v. Caswell*, 20 Fed. Rep. 249.

fore any suit has been brought against the owners or their vessel,<sup>1</sup> or after suit has been brought and a decree rendered in the cause.<sup>2</sup> They are properly brought by owners in the District Court within whose district the wreck lies,<sup>3</sup> or of that of the port to which the vessel is bound at the time of the loss, or in the district in which a suit is pending by the owners of a vessel lost by collision, to recover damages for the loss of the vessel.<sup>4</sup> And the libel or petition can be filed in any District Court where the ship may have been libelled, or if the vessel be not libelled then in the District Court for any district in which the owner may be sued in that behalf,<sup>5</sup> and by a later rule it is provided that such proceedings may be taken in the Circuit Courts of the United States where such cases are pending upon appeal from the District Courts.<sup>6</sup>

The court obtains jurisdiction by an assignment of the freight and wreckage where situated.<sup>7</sup>

<sup>1</sup> *Ex parte Slayton*, 105 U. S. 451; *The Alpena*, 8 Fed. Rep. 280.

<sup>2</sup> *The Benefactor*, 103 U. S. 239.

<sup>3</sup> *The John Bramall*, 10 Ben. 495, in which case the practice to be followed is discussed.

<sup>4</sup> *In re Leonard*, 14 Fed. Rep. 58.

<sup>5</sup> Adm. Rule 57.

<sup>6</sup> Adm. Rule 58.

<sup>7</sup> *Ex parte Slayton*, 105 U. S. 451. In *Wallace v. Providence and Stonington S. S. Co.*, 14 Fed. Rep. 56, an action was brought

It does not require any actual possession by the marshal, nor proceedings to take the vessel from the possession of a sheriff, when the vessel is under an attachment issued by a state court.<sup>1</sup>

§ 104. The owners of a foreign ship, wrecked on the coast of the United States, are entitled to the proceedings to limit their liability.<sup>2</sup> And in a collision with foreign vessels, occurring on the high seas, the owners when sued in the courts of the United States are entitled to the same limitation of liability,<sup>3</sup> and the owners of an American vessel are entitled to the limit of liability in a collision with a foreign vessel.<sup>4</sup>

The right of foreigners to obtain the limita-

against the owners of a line of steamboats for a loss occasioned by a collision between two steamboats belonging to the same owners. The owners filed a petition to limit their liability by proceedings instituted in the District Court, and surrendered only that vessel, on board of which the plaintiff was a passenger, which vessel had been greatly injured, and the limitation of liability was allowed. As the plaintiff might have proceeded *in rem* against the other vessel also, it would seem as if such a surrender would not satisfy the provisions of the act of congress. The allegations were that the loss was occasioned by the fault of both vessels. See *Norwich Co. v. Wright*, 13 Wall. 104.

<sup>1</sup> *The Mendota*, 14 Fed. Rep. 358.

<sup>2</sup> *The John Bramall*, 10 Ben. 495.

<sup>3</sup> *The Scotland*, 105 U. S. 24.

<sup>4</sup> *In re Leonard*, 14 Fed. Rep. 53.

tion of liability given by the act of congress when sued in the courts of the United States, was sustained in the case of *The Scotland*,<sup>1</sup> on the ground that in all actions for injuries occurring on the high seas outside the territorial jurisdiction of any nation, the remedy was administered according to the law of the forum, and was not affected by the law of the nation of the vessel, unless the action grew out of a collision between two vessels of the same nationality, or perhaps between two vessels belonging to different nationalities, whose laws governing the remedy were the same, and differed from the law of the forum, in which case the foreign law would apply. In this case the owners of a British vessel, lost by a collision with an American vessel, obtained, when sued by the American owners in the courts of the United States, the total exemption from liability given by the American act on the loss of their own vessel, although by the British act their liability was limited to a sum based upon the tonnage of their vessel.<sup>2</sup>

<sup>1</sup> 105 U. S. 24.

<sup>2</sup> The English courts had refused the limitation of liability under the English act to the owners of an American vessel, when sued for a collision on the high seas with another American vessel, *Cope v. Doherty*, 4 Kay & John. 367; also to the owners of a foreign vessel, when sued for a collision with an English vessel,



§ 105. The act of 1851<sup>1</sup> applies only to actions for torts and for a breach of a duty on the part of a carrier under a contract of carriage, by reason of the acts of his agent. It does not therefore extend to the implied warranty of seaworthiness in a contract of affreightment, made by the master as agent for the owners. So that in a libel against one of the owners of a vessel for damage to cargo arising from a leak occasioned by unseaworthiness, the owner was held not entitled to surrender his share of the vessel and claim exemption from personal liability under the act.<sup>2</sup> And to fault in the original construction of the ship, the act can have no application.<sup>3</sup> But a fault in lading a vessel under a charter party causing unseaworthiness,

although the collision occurred in what are considered English waters, *General Iron Screw Collier Co. v. Schumanns*, 1 John. & H. 180; and allowed the limitation of liability to the owners of an English vessel whose liability was established for a collision which occurred in the Mediterranean Sea with a Belgian vessel. *The Amalia*, Brown & Lush. 151.

The anomalous result produced by the English decisions is now cured by legislation, and foreigners are entitled to the same limitation as English owners when sued in the courts of Great Britain.

<sup>1</sup> Rev. Stat. §§ 4282-9.

<sup>2</sup> *In re Daniel Sinclair*, 8 Am. L. Reg. 206; *The Rebecca*, 1 Ware, 188; *Wattson v. Marks*, 2 Am. L. Reg. 157.

<sup>3</sup> *The North Star*, 106 U. S. 17; see, also, *In re Leonard*, 14 Fed. Rep. 53.

will not destroy the right of the owner to a limitation of his liability, when there is no fault in the original construction or equipment of the vessel.<sup>1</sup>

A reasonable construction of the act requires that the negligence of a master, even if he is one of the owners, should not create a personal liability on the part of the other innocent owners,<sup>2</sup> and is satisfied by holding the owners responsible for furnishing a seaworthy vessel, properly equipped, and not permitting them to evade such liability either under the statute or by express limitation in the contract.<sup>3</sup>

<sup>1</sup> *Sumner v. Caswell*, 20 Fed. Rep. 249.

<sup>2</sup> *In re Leonard*, 14 Fed. Rep. 53.

<sup>3</sup> *The Regulus*, 18 Fed. Rep. 380; *Sumner v. Caswell*, 20 Fed. Rep. p. 249. The rules which treat certain agents representing the principal as vice-principals, if enforced through the findings of juries, destroy the value of the rule of the general maritime law introduced into that of the United States by this statute. In *Mullan v. The Phila. So. S. S. Co.*, 78 Penna. St. 25, it was left to the jury to find whether a master stevedore was not in the relation of a vice-principal as to a fellow-stevedore; and in the same circle of employment as the mate in reference to the overweighting of a rope used for discharging cargo, so as to charge the owners with negligence. The mate was held not to be the fellow-servant of a deck-hand of a steamship in *Daub v. The No. Pac. R. R. Co.*, 18 Fed. Rep. 625; see, also, *Hill Mfg. Co. v. The Prov. & N. Y. Steamship Co.*, 113 Mass. at p. 560. It is believed that they do not apply to this statute, which relieves the ship-owner from liability for the acts of his agent to the full

§ 106. It is not yet determined by the Supreme Court whether the loss of the vessel on the same voyage by a cause not connected with the collision, will discharge the responsibility of the owners for such a damage. No opinion was expressed upon this point in the case of *The Benefactor*, although the question presents itself to the mind of the judge who delivered the opinion of the court.<sup>1</sup>

extent imposed on him by the law in other agencies. The latest case in the Supreme Court, *Chicago, M. & St. P. Ry. Co. v. Ross*, 112 U. S. , in which the conductor of a train was held to be the representative of the corporation so as to make his negligence that of the principal towards a fellow servant would, if applicable to a ship, annul the statute to limit the liability of ship-owners. But the considerations which led to the passage of this act will probably prevent such an application. The words of the statute apply to losses "without the privity or knowledge of the owner," and these words exclude liability for acts for which the owners would otherwise be liable. It was not intended to allow the ship-owner to escape the full obligation for his personal misconduct. But as he necessarily acts by his agents, who are not under his personal supervision on the voyage, he incurs liability to the limited extent of the value of his vessel as it remains in his hands, for the consequences of their faults and to the full extent of the loss for his own. An instance in point is that of unseaworthiness occasioned by improper lading. Unseaworthiness so produced does not entail full responsibility as it would in the case of a defective construction of the ship; *Sumner v. Caswell*, 20 Fed. Rep. 249.

<sup>1</sup> "What may be the rule if, after the collision has occurred, the offending vessel should meet with other disasters greatly impairing

But the reasons for putting a different interpretation on the American statute, from that placed by the English courts on their early statute, seem to answer this question affirmatively; so that by the loss of the ship-owner's property on the same voyage by any cause, without the privity or fault of the owner, all personal liability is at an end.

The construction put upon the act of 1851 is that it was passed to encourage investments in shipping in the same manner as other undertakings are encouraged, by the creation of limited partnerships and corporations without the risk of "that indefinite liability for the acts of others" which deters men from embarking in undertakings over which they cannot have personal supervision,<sup>1</sup> so as to put only the capital embarked at the risk of the business. It is not a personal liability like that of the subscribers to the stock of a national bank to the extent of the stock held, in addition to that paid in as capital, a liability which remains after the capital is exhausted; but all personal liability is put at an end by surrendering the ship and her earnings, which represent the capital in-

her value, is a question which may require further consideration when the case arises." *The Benefactor*, 103 U. S. at p. 247, per Bradley, J.

<sup>1</sup> *The Scotland*, 105 U. S. at 31.

vested by the ship-owner, which he placed at the risk of the business.

As the capital diminishes or is lost, the liability diminishes and disappears, whether by collision or the dangers of the sea, or depreciation by natural cause.

A collision, without the personal fault of the ship-owner, imposes a lien upon the vessel for its consequences, and a personal responsibility to that extent on its owner, if he chooses to accept it by retaining his vessel; this personal responsibility diminishes with the value of his vessel, and is extinguished by its loss.

No good reason can be assigned for this responsibility continuing after the loss of his vessel by other causes than the collision itself, and this seems to be the reading of the rule of the maritime law in the case of *The Scotland*, to which we have had occasion so often to advert, "while our law adopts the maritime rule of graduating the liability by the value of the ship after the injury, as she comes back into port and the freight actually earned."<sup>1</sup>

<sup>1</sup> The case of *Thommasen v. Whitwill*, 12 Fed. Rep. 891, Circuit Court, C. D. of N. Y. sustains this view; that the loss of the offending vessel on the same voyage by a cause not connected with the collision, discharges the liability of the ship-owner.

The same reasoning would seem to apply to a loss on any subsequent voyage, if this reading of the act of congress is correct. It is decided otherwise in the District Court of Illinois,<sup>1</sup> as to damages incurred on any previous voyage, as follows: "It seems to me that each voyage or trip, each separate journey, which the ship makes from one port to another, must be treated as a separate venture, involving its own particular hazards, losses, and earnings; and that when each voyage is ended, it is for the owner to decide whether the losses have been such as to make it expedient for him to invoke the protection given by this act of congress. If he does not decide to do this, but sends his ship upon a new voyage, he thereby concedes his personal liability for the damages incurred on the past voyage."

The decisions of the Supreme Court only apply to the voyage in which the loss is suffered; at the end of which the owner has the option of retaining his vessel, and with it his personal liability for damages which occurred upon that voyage, or of having the extent of his personal liability ascertained by an appraisement of his vessel or discharged by surrender to trustees.

<sup>1</sup> *The Alpena*, 8 Fed. Rep. 280.

But a loss of the vessel by any cause not connected with the fault of the owner is tantamount to her surrender into court in case she survives, and is followed by the consequence of extinguishing the personal liability of her owners by the mere operation of the maritime rule itself where the remedy is only *in rem*.<sup>1</sup>

The institution of proceedings to limit liability must be subject to some limitation, and the doctrine of laches may apply to it;<sup>2</sup> but such doctrine will apply with greater reason to those who neglect to perfect the claim by suit *in rem*.

And the happening of an injury to another vessel or other cause which might give rise to a right of action does not necessarily imply an assertion by the party injured of a right of action against the owners, and the owners should not be called upon to exercise an election to surrender the vessel and freight until some assertion of liability is made by the party injured, although they may do so.<sup>3</sup> The owner may therefore treat the non-assertion of a claim as an acknowledgment of want of fault, and as a consent to the continued use of the ship

<sup>1</sup> The North Star, 106 U. S. 17.

<sup>2</sup> The Benefactor, 103 U. S. p. 244.

<sup>3</sup> The Benefactor, 103 U. S. 239; The Alpena, 8 Fed. Rep. 280; *Ex parte Slayton*, 105 U. S. 451.

which is the fund for the payment of the damage with its consequent liability to deterioration and loss while in use by its subjection to later, and therefore superior liens.

In the view that the act of congress limiting the liability of ship-owners created the same liability as to capital invested as that of ordinary corporations, this would seem reasonably to follow. Otherwise each subsequent loss would impose an additional personal liability beyond the value of the vessel; so that by the continued use of the vessel after a cause of injury has once occurred, the liability of the owner might be indefinitely extended, and the right of surrender would practically be nullified.

The law of diligence requires pursuit of the remedy for a lien in the interest of all the world, which it is in effect a proceeding against. A party injured, who neglects to prosecute his claim for damages on a vessel's arriving in port, sustains, as a consequence of his neglect, the imposition of claims of other parties against the property which become superior to his own, and he cannot reinstate himself for the loss of a lien, incurred by delay, by retaining a personal action against the owner, after the ship and the right of the owners to surrender the same is lost to the owner by a peril of



the sea, or any cause for which he is not liable; any more than he can after the ship is lost as a means for redress, by reason of a superior claim attaching after his right of action first accrued.<sup>1</sup>

<sup>1</sup> See Priority of Liens, § 42.

## CHAPTER VI.

### PROCEEDINGS IN ADMIRALTY CAUSES.

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| <p>Courts proceed on equitable principles, § 107.</p> <p>Cannot give remedies as in equity, § 107.</p> <p>May enforce legal title or ownership, § 107.</p> <p>By whom suits may be brought, § 108.</p> <p>Recoupment allowed in tort as well as in contract, § 108.</p> <p>Statutes of limitation do not apply to proceedings <i>in rem</i>, § 109.</p> <p><i>In personam</i>, <i>quærs</i>, § 109.</p> <p>Limitations under statute of a state must be complied with, § 110.</p> <p>Interest and costs discretionary, § 111.</p> <p>Costs, when damages are divided, § 112.</p> <p>Evidence, rules of, not always applicable in admiralty, § 113.</p> <p>Practice, regulated by Supreme Court, § 114.</p> <p>Proceedings <i>in personam</i> may be taken in all maritime causes, § 115.</p> <p>Apparent exception, § 116.</p> <p>By arrest of person, when, § 117.</p> <p>By attachment of goods, § 117.</p> <p>Property of non-residents may be attached, § 117.</p> <p>When process <i>in rem</i> and <i>in personam</i> may be joined, § 118.</p> <p>Change of proceedings by amendment, § 118.</p> | <p>Proceedings <i>in personam</i>, no bar to proceedings <i>in rem</i>, § 119.</p> <p>Right of parties to intervene who could not originally sue, § 120.</p> <p>Process <i>in rem</i>, definition, § 121.</p> <p>Allowance of, a judicial act, § 122.</p> <p>Action will not lie for arrest, § 122.</p> <p>Stipulation, a substitute for the <i>res</i>, § 123.</p> <p>Stipulations taken under power inherent in the court, § 124.</p> <p>Not allowed, when it would defeat object of suit, § 124.</p> <p>Claimant, who may be, § 125.</p> <p>Liability of claimant, when it arises, § 125.</p> <p>Right of claimant, how contested, § 125.</p> <p>Death of claimant does not abate suit, § 126.</p> <p>Stipulator, extent of liability, § 127.</p> <p>Decrees and execution against stipulators, § 128.</p> <p>Remedies of stipulators, § 128.</p> <p>Stipulation discharges the lien, § 129.</p> <p>Ships released on, cannot be re-arrested for same cause, § 129.</p> <p>Stipulator not entitled to subrogation against the <i>res</i>, § 129.</p> <p>When decrees in admiralty become a lien, § 130.</p> <p>Right to create liens by decree, discretionary, § 131.</p> |
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Actual seizure, necessary to jurisdiction <i>in rem</i> , § 182.	Sale under proceedings <i>in rem</i> discharges all liens, § 184.
Effect of, notice to all parties, § 182.	By a court having jurisdiction, cannot be impeached, § 185.
Where seizure must be made, § 182.	What proceedings are <i>in rem</i> , § 186.
Whether vessel in transit can be arrested, § 183.	

§ 107. A COURT of admiralty, while it exercises its jurisdiction upon the principles of a court of equity,<sup>1</sup> has no power to give equitable relief by injunction, nor to compel the specific performance of a contract.<sup>2</sup> Its jurisdiction extends to set aside a title obtained by a sale regularly made under the proceedings of a court of admiralty in the case of fraud or misconduct of the parties to the proceeding.<sup>3</sup> It has no power to take an account in proceedings, either *in rem* or *in personam*, as between the owners themselves or their agents<sup>4</sup> as to the employment of the vessel, except when it arises incidentally in the exercise of its jurisdiction.<sup>5</sup> Its

<sup>1</sup> *Dean v. Bates*, 2 Wood. & M. 87; *The Sparkle*, 7 Ben. 528.

<sup>2</sup> *Knyock v. The S. C. Ives*, Newb. 205; *Davis v. Child*, 2 Ware, 78; *The Raleigh*, Cannon, and *Astoria*, 2 Hughes, 44; *The C. C. Trowbridge*, 14 Fed. Rep. 874; *Andrews v. The Essex Marine Ins. Co.*, 3 Mason, 6.

<sup>3</sup> *The Sparkle*, 7 Ben. 528.

<sup>4</sup> *The Fair Play*, 1 Bl. & How. 186; *Ward v. Thompson*, 22 How. 330; *Grant v. Poillon*, 20 How. 162; *Minturn v. Maynard*, 17 How. 477; *Vandewater v. Mills*, 19 How. 82; *The Larch*, 3 Ware, 28.

<sup>5</sup> *Kellum v. Emerson*, 2 Curtis, 79; *The John E. Mulford*, 18 Fed. Rep. 455.

province does not extend to review an award in a maritime cause properly submitted to arbitrators before any action was brought, on the ground of misconduct of the arbitrators.<sup>1</sup>

In actions for possession, it enforces only the legal and not the equitable title of an owner, and it can give no redress in causes where the right is created by a trust arising *ex maleficio*,<sup>2</sup> it can enforce only a legal right of possession.<sup>3</sup>

§ 108. A suit may be brought in the name of either the legal or equitable owner; thus an insurer who has paid a loss, may institute an action against the carrier in his own name,<sup>4</sup> as in equity;

<sup>1</sup> The Union, 20 Fed Rep. 539.

<sup>2</sup> Davis v. Child, 2 Ware, 78; Wenberg v. A Cargo of Mineral Phosphate, 15 Fed. Rep. 285.

<sup>3</sup> *Ante*, Ch. II. p. 65; Kellum v. Emerson, 2 Curtis, 79; The William D. Rice, 20 Law Rep. 501; Hill v. The Amelia, 6 Ben. 475; The Perseverance, 1 Bl. & How. 385. In The C. C. Trowbridge, 14 Fed. Rep. 874, the mortgagor brought an action against the mortgagee to recover possession of his vessel, on the ground that the mortgage was paid, and the right of possession of the mortgagee had ceased. The right of the mortgagor to the possession after payment was considered an equitable right, not a legal one; the subject, however, was not maritime, and it could only be enforced by an account of the vessel's earnings; see, also, The Martha Washington, 1 Cliff. 463.

<sup>4</sup> Garrison v. Memphis Ins. Co., 19 How. 312; The Monticello, 17 How. 152; Cargo of the George, Olcott, 89; Fretz v. Bull,

although at law, the suit must have been in the name of the insured;<sup>1</sup> or the insured may sue in his own name for the benefit of the insurer.<sup>2</sup> An insurer who has accepted an abandonment, may be permitted to intervene, and become the *dominus litis* in a suit *in rem*,<sup>3</sup> but underwriters who refuse to accept an abandonment will not be permitted to defend.<sup>4</sup> An assignee of a chose in action,<sup>5</sup> or a bailee, such as a master having no right of property, may bring suit for an injury to goods or vessel in his own name,<sup>6</sup> as can also a mortgagee;<sup>7</sup> and a consignee may sue in his own name or as agent.<sup>8</sup> The administrator appointed under the

12 How. 466; *The City of Paris*, 1 Ben. 529; *The Sun M. Ins. Co. v. Miss. Val. Trans. Co.*, 17 Fed. Rep. 919.

<sup>1</sup> *Mason v. Sainsbury*, 26 E. C. L. R. (3 Douglass) 51; *Yates v. Whyte*, 33 E. C. L. R. 349.

<sup>2</sup> *Fretz v. Bull*, 12 How. 466; *The Monticello*, 17 How. 152.

<sup>3</sup> *The Ann C. Pratt*, 1 Curtis, 340.

<sup>4</sup> *The Packet*, 3 Mason, 255; *The Boston*, 1 Sumner, 328; *The Henry Ewbank*, 1 Sumner, 400.

<sup>5</sup> *Cobb v. Howard*, 3 Blatch. 524; *The Mary Ann Guest*, 1 Olcott, 498; *The N. Carolina*, 15 Peters, 40; *The Boston*, 1 Bl. & How. 309.

<sup>6</sup> *The Commerce*, 1 Black, 574; *Newell v. Norton*, 3 Wall. 257; *The Nahor*, 9 Fed. Rep. 213.

<sup>7</sup> *The Grand Republic*, 10 Fed. Rep. 398.

<sup>8</sup> *Houseman v. The North Carolina*, 15 Peters, 40; *McKinlay v. Morrish*, 21 How. 343; see, also, *Lawrence v. Minturn*, 17 How. 100; *Grove v. Brien*, 8 How. 429; *The Thames*, 14 Wall. 98.

laws of a state, not within the district of the court, may sue and intervene in admiralty for the interest of a decedent.<sup>1</sup> A foreign consul may institute proceedings;<sup>2</sup> a minor may sue for his wages,<sup>3</sup> and even the rights of an unborn child may be considered and protected in proceedings *in rem*.<sup>4</sup>

The principle of recoupment is enforced in admiralty at times in torts as well as in contracts.<sup>5</sup> And the rule, by which the damages are apportioned between the tortfeasors,<sup>6</sup> enforces contributions by both parties in fault to liquidate the damages of a third party injured, such as the owners of the cargo, in an action where only one of those charged with the negligence is sued,<sup>7</sup> and process can issue to bring another vessel into adjudication, which has not been sued on an allegation of fault in such vessel by the party against whom suit has alone been brought.<sup>8</sup>

§ 109. To what extent the admiralty courts give effect to statutes of limitation in proceedings

<sup>1</sup> *The Boston*, 1 Bl. & H. 309.

<sup>2</sup> *The Henry Ewbank*, 1 Sumner, 400.

<sup>3</sup> *The David Faust*, 1 Ben. 183.

<sup>4</sup> *The George and Richard*, L. R. 3 A. & E. 466.

<sup>5</sup> *The Reuben Doud*, 9 Biss. 458; *ante*, Chapter IV. § 77.

<sup>6</sup> *The North Star*, 106 U. S. 17.

<sup>7</sup> *The Eleanora*, 17 Blatch. 88; *The Farnley*, 8 Fed. Rep. 629.

<sup>8</sup> *The Hudson*, 15 Fed. Rep. 162; Admiralty Rule, 59; see *The Charkieh*, L. R. 4 A. & E. 120.

*in personam* is left undecided by the Supreme Court;<sup>1</sup> although they are said to be generally followed where no special equitable reason exists for not doing so.<sup>2</sup> The reason why effect is not given to such statutes in proceedings *in rem* is because of the frequency of voyages which prevent the enforcement of such process against the ship itself. This reason does not hold in a personal suit against the owner.<sup>3</sup>

§ 110. On the other hand, where the time within which a lien may be enforced is limited by the law of the state which creates the lien, such limitations like all other conditions of the statute are strictly enforced.<sup>4</sup> And when a lien for supplies furnished to a vessel was by the terms of the stat-

<sup>1</sup> *Reed v. The Ins. Co.*, 95 U. S. 23. *Betts, J. in The Utility*, 1 Bl. & How. p. 221, held such statutes not to be binding in proceedings *in personam* nor *in rem*. See *Williard v. Dorr*, 3 Mason, 91; *Brown v. Jones*, 2 Gall. 477; *Coburn v. The Factors & Traders' Ins. Co.*, 20 Fed. Rep. 644; *Sonderburg v. The Towboat Co.*, 3 Woods, 146; *Averill v. Yorke*, cited in *Cohen's Admiralty* at 164.

<sup>2</sup> *Scull v. Raymond*, 18 Fed. Rep. 547; *Hall v. Hudson*, 2 Sprague, 65.

<sup>3</sup> See *ante*, Ch. III. § 64.

<sup>4</sup> *The Alida*, 1 Abb. Adm. 165; *The Red Wing*, 14 Fed. Rep. 869; *The Ann*, 8 Fed. Rep. 923; *The Edith*, 94 U. S. 518; *The Lottawana*, 21 Wall. 558. See, also, *The Guiding Star*, 18 Fed. Rep. 263; *The Grapeshot*, 22 Fed. Rep. 123.

ute only enforceable within nine months from the date when incurred, the fact, that during the prescribed period the vessel was in the hands of a receiver appointed by a state court and could not be attached, did not suspend or enlarge the operation of the statute.<sup>1</sup>

§ 111. The allowance of interest is discretionary in the admiralty.<sup>2</sup> Although, as a rule, the prevailing party is *prima facie* entitled to costs, they are nevertheless in the sound discretion of the court.<sup>3</sup> Costs do not always necessarily follow the decree in favor of the prevailing party.<sup>4</sup>

<sup>1</sup> The Red Wing, 14 Fed. Rep. 869.

<sup>2</sup> Hemmenway v. Fisher, 20 How. 255; The Rebecca Clyde, 12 Blatch. 403.

<sup>3</sup> The Sapphire, 18 Wall. 51; The Moslem, Olcott, 374; The Martha, 1 Bl. & H. 151; Shaw v. Thompson, Olcott, 144; The Oriole, Ibid. 67; The Malek Adhel, 2 How. 210. See remarks by Grier, J., on sound discretion in awarding costs in Gonzales v. Minor, 2 Wall. Jr. 348.

<sup>4</sup> They were refused in The Colon, 18 Blatch. 277, and in The Maggie Ellen, 19 Fed. Rep. 221, where the services on which the amount of salvage depended were greatly exaggerated, and also in Irzo v. Perkins, 10 Fed. Rep. 779, where part of the claim was for freight and was abandoned and the recovery was put upon a different ground from that stated in the libel. And the costs of an unnecessary arrest was put on the salvors in The Charlotte, 3 Wm. Rob. 68; and in The Sampson, 4 Blatch. 28. And where a seaman brought a separate suit for wages while a previous suit had



§ 112. It would appear that in collision, where the damages are divided on the ground of mutual fault, the costs are also apportioned between the parties.<sup>1</sup> This rule is not uniform in all the circuits and it has been considered in some courts that the libellant in collision should recover full costs where he recovers only half damages.<sup>2</sup>

been instituted for wages in which he might have joined; *Reed v. Hussey*, 1 Bl. & H. 525. Where deceit was practised by the master in attempting to exaggerate the expenses incurred by a collision to his vessel, Mr. Justice Nelson said if it had been made with the connivance of the owner he would have disallowed the whole claim, and intimated that thereafter the responsibility of the owner would be incurred for such attempts of the master; and connivance by the party furnishing materials would have the same effect. So also services in going to the aid of a vessel on fire were refused any compensation by reason of an attempt to force the services as salvors on the party at risk after refusal of assistance; *The New Harbor Protection Co. v. The Charles P. Choteau*, 5 Fed. Rep. 463. And where a claim was improperly delayed against remnants until part of the shares were distributed the claim although originally good against the fund was disallowed *pro tanto*; *In re Wright*, 16 Fed. Rep. 482. Claimants of a vessel defending against improper demands upon the remnants of the fund were allowed the costs of such defence out of the fund, although insufficient to pay all claims; *In re Wright*, 16 Fed. Rep. 482.

<sup>1</sup> *The America*, 92 U. S. 432; *The Pennsylvania*, 15 Fed. Rep. 814.

<sup>2</sup> See *The Hercules*, 20 Fed. Rep. 205; *The Austin*, 3 Ben. 11; *The Baltic*, 3 Ben. 195; *The City of Hartford*, 7 Ben. 510; *The Wm. Cox*, 3 Fed. Rep. 645; *The Excelsior*, 12 Fed. Rep. 195;

In suits for collisions brought by the master of a ship to recover the loss to cargo as well as to the ship itself, where the damages are apportioned,<sup>1</sup> the rule apportioning the costs would seem to be more correct, if costs are allowed to either party, as both parties are actors, and the decree is in effect against the libellant for half the damage to the cargo, the full amount of which can, under some circumstances, be adjudged to be paid by the libellant. The decree in such a case is substantially that both vessels are in fault.

§ 113. Courts of admiralty are not bound by the rules of evidence which are applied in courts of common law; they take notice of matters not proved.<sup>2</sup> The rule in equity that an answer directly responsive to the allegation of the bill, is to be overcome by two witnesses does not prevail in admiralty.<sup>3</sup>

*The Mary Patten*, 2 Low. 196. See *Vanderbilt v. Reynolds*, 16 Blatch. 80, in which the cases are fully cited. As to costs in the English admiralty, see cases cited in *The Schwan*, L. R. 4 A. & E. 187. Where both vessels are in fault the owners of the ships are not entitled to the costs of any litigation growing out of the collision; *The Hector*, L. R. 8 P. D. 218.

<sup>1</sup> *Vanderbilt v. Reynolds*, 16 Blatch. 80.

<sup>2</sup> *The J. F. Spencer*, 3 Ben. 337; *The Peerless*, 13 Moo. P. C. C. 484. See *Leathers v. The Salvor Wrecking Co.*, 2 Woods, 680.

<sup>3</sup> *Andrews v. Wall*, 3 How. 568; *Sherwood v. Hall*, 3 Sum. 127; *Eads v. The H. D. Bacon*, Newb. 274; *The L. B. Gold-*

§ 114. Trials in the admiralty may be by jury, in causes arising on the lakes under the Revised Statutes, § 566, or in the Circuit Court on appeal in any cause, by consent of the parties who appear;<sup>1</sup> whether the findings of the jury are more than advisory, as in causes in equity, is not decided.<sup>2</sup> The witnesses should be examined orally in the District Courts, and their depositions cannot be read until their absence is accounted for.<sup>3</sup>

The rules of procedure and practice are established by the Supreme Court of the United States, under the acts of congress of May 8, 1792, and of August 1, 1842.<sup>4</sup>

The act of congress of 1789, called "The short practice act," directed proceedings in admiralty to conform to the civil law.<sup>5</sup> This was altered so as to require such proceedings to conform to the principles, rules, and usages which belong to courts of admiralty as distinguished from courts of common

smith, Newb. 123; *Cushman v. Ryan*, 1 Story, 91. As to the effect of answer see *Hutson v. Jordan*, 1 Ware, 385.

<sup>1</sup> Supp. Rev. Stat. p. 135.

<sup>2</sup> *Boyd v. Clark*, 13 Fed. Rep. 908.

<sup>3</sup> *Rutherford v. Geddes*, 4 Wall. 220; *The Hypodame*, 6 Wall. 216.

<sup>4</sup> 1 Stat. at Large, 276; Rev. Stat. § 913.

<sup>5</sup> 29 September, 1789, § 2, 1 Stat. at Large 93; *Atkins v. The Disintegrating Co.*, 18 Wall. 272.

law.<sup>1</sup> By the acts of 1789,<sup>2</sup> and 1842,<sup>3</sup> the forms and modes of proceedings in admiralty were made subject to alteration and addition by the admiralty courts, and to regulations by the Supreme Court, by rules prescribed from time to time to any Circuit or District Court, not inconsistent with the laws of the United States.<sup>4</sup>

And by the act of 1793,<sup>5</sup> power was given to the several Circuit and District Courts, in any manner not inconsistent with the laws of the United States, or with any rule prescribed by the Supreme Court, to make rules of practice regulating their own proceedings "as may be necessary or convenient for the advancement of justice, and the prevention of delays in proceedings."

By virtue of these provisions the Supreme Court has established, and from time to time has modified the proceedings in the court of admiralty.<sup>6</sup>

§ 115. In addition to process *in rem*, admiralty courts have complete jurisdiction by remedies *in personam* of all causes of a maritime nature. The true criterion of its jurisdiction to proceed *in personam* is the nature and subject matter of the con-

<sup>1</sup> Act of 8th May, 1792, 1 Stat. at Large, 276; Rev. Stat. § 913.

<sup>2</sup> Rev. Stat. § 918.

<sup>3</sup> Rev. Stat. § 917.

<sup>4</sup> The St. Lawrence, 1 Black, at p. 528.

<sup>5</sup> Rev. Stat. § 918.

<sup>6</sup> See App. and Rules in Admiralty.

tract, whether it is a maritime contract, having reference to maritime service, or in maritime transactions.<sup>1</sup> And if the cause is a maritime one, subject to admiralty cognizance, the jurisdiction is complete over the person as well as the vessel.<sup>2</sup>

A maritime lien is not necessary in order to give jurisdiction to the admiralty courts in maritime causes.<sup>3</sup> As a rule, whenever a court of common law has power to give redress in subjects of a maritime nature, the admiralty courts have jurisdiction by remedies *in personam*.<sup>4</sup> The original jurisdiction of the District Court is, in proceedings *in rem* in maritime subjects, exclusive of the state and Circuit Courts;<sup>5</sup> whether arising from tort or contract, although the process can only be enforced by virtue of the law of the state.<sup>6</sup>

<sup>1</sup> *Ins. Co. v. Dunham*, 11 Wall. 1; *Manro v. Almeida*, 10 Wh. 478.

<sup>2</sup> *The New Jersey St. Nav. Co. v. The Merchants' Bank*, 6 How. at 392; *Morewood v. Enequist*, 23 How. 491.

<sup>3</sup> *Maury v. Culliford*, 10 Fed. Rep. 388; *The Fifeshire*, 11 Fed. Rep. 743; *The Tubal Cain*, 9 Fed. Rep. 834; *The J. F. Warner*, 22 Fed. Rep. 342.

<sup>4</sup> *New Jersey St. Nav. Co. v. The Merchants' Bank*, 6 How. 344; *Morewood v. Enequist*, 23 How. 491; *Oakes v. Richardson*, 2 Low. 173; *The Monte A.*, 12 Fed. Rep. 331.

<sup>5</sup> *The Hollen*, 1 Mason, 431; *The Creole*, 1 Phila. (Pa.) 190; *Governor of Georgia v. Madrazo*, 1 Peters, 110.

<sup>6</sup> *The Lottawana*, 21 Wall. 558.

While in actions *in personam*, the clause, "saving to suitors, etc.," in the judiciary act of 1789, is held to have been introduced only to prevent any possible doubt whether the common law courts were excluded from taking jurisdiction *in personam* when redress might be had in admiralty.

§ 116. An apparent exception exists in salvage and general average.<sup>1</sup> These are not, however, exceptions to the rule, because it will be found that the court is said to have no jurisdiction *in personam*, because no personal liability exists, as in the cases of contracts of bottomry, except as provided in Admiralty Rule 18.<sup>2</sup>

Judge Story states that the personal liability of the owner of a ship on a bottomry bond only

<sup>1</sup> *The Sabine*, 101 U. S. 384; *Cutler v. Rae*, 7 How. 729; this case is sometimes supposed to be overruled by expressions in late cases; *Coast Wrecking Co. v. The Phoenix Ins. Co.*, 7 Fed. Rep. 236, affirmed in 13 Fed. Rep. 127; *Ins. Co. v. Dunham*, 11 Wall. 1. It is affirmed in *Bags of Linseed*, 1 Black, 108.

<sup>2</sup> "In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct, or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrongdoer."

arises from the possession of the property *cum onere*, and that no liability can be enforced against him personally except to the extent of the value of the property which comes into his possession.<sup>1</sup>

In *Cutler v. Rae*<sup>2</sup> it is held that the acceptance of a cargo by a consignee who is not the owner does not create a personal liability for the payment of general average incurred on the voyage, as it would of stipulated freight. This ruling is in accordance with the custom, which is a part of the law merchant, by which the master, when he intends to charge cargo, delivered to a consignee, with a claim for general average, takes a deposit or an average bond from the consignee before delivery; the master having a right to retain for the lien.<sup>3</sup> A delivery without requiring such a bond would, therefore, imply a waiver of such claim, and would justify the consignee in paying over the proceeds to his principal. And the consignee, by accepting the cargo does not necessarily become personally liable for general average.<sup>4</sup> The only question involved in *Cutler v. Rae* was the personal liability of a consignee, who was not the owner, arising from an acceptance of the goods.

<sup>1</sup> *The Virgin*, 8 Peters, at page 554.

<sup>2</sup> 7 How. 729.

<sup>3</sup> *The Morning Mail*, 17 Fed. Rep. 545.

<sup>4</sup> *Scaife v. Tobin*, 3 B. & Ad. (23 E. C. L. R.) 523.

The suit was therefore dismissed, not strictly speaking for want of jurisdiction in the court, but for defect in the remedy.<sup>1</sup>

As, in all other cases of maritime contracts and services, if the consignee was the owner, or had become personally liable for the payment of general average, by accepting goods shipped under a bill of lading containing a clause stipulating for delivery on payment of freight and general average, the suit may be instituted in admiralty.<sup>2</sup>

In *The Sabine*<sup>3</sup> it is decided that a libel *in personam* for salvage will not lie against the consignee of cargo saved, in the absence of evidence that the service was rendered at the request of the consignee. It is also said in this case that the owners would not be liable *in personam* for salvage on cargo accepted under the same circumstances, but the owners were not joined in the action. This conclusion as to the personal liability of owners results from the reading of the 19th Rule. "In all suits for salvage, the suit

<sup>1</sup> *The Monte A.*, 12 Fed. Rep. at p. 336.

<sup>2</sup> *Mutual Safety Ins. Co. v. Cargo of the George, Olcott*, 89; *The St. Josephs*, 6 McLean, 573; *Dupont v. Vance*, 19 How. 162; *The John Perkins*, 21 Law Rep. 87; *Morewood v. Enequist*, 23 How. 491; *Oakes v. Richardson*, 2 Low. 173. See *The Coast Wrecking Co. v. The Phoenix Ins. Co.*, 13 Fed. Rep. 127.

<sup>3</sup> 101 U. S. 384.



may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed." Otherwise the acceptance, by the owners, of the cargo saved would be equivalent to a request or a ratification of the service performed by salvors for the benefit of the owners.

In cases of salvage and other services, performed at the request of the master, he is agent for the owners, in accepting the services of salvors, so as to bind them personally; especially if they ratify his acts by accepting the results, and he is also agent *ex necessitate* for the owners of the cargo. The right, however, would seem by the rule to be limited to proceedings *in rem* against the property saved unless such property is destroyed after having been restored to the owners or is clandestinely removed from the jurisdiction.<sup>1</sup>

§ 117. The process *in personam* may be prosecuted by attachment of the person in such causes as would warrant the issuing of a *capias* in analogous actions at common law in the state courts,<sup>2</sup>

<sup>1</sup> *The Virgin*, 8 Peters, 538; *The Sabine*, 101 U. S. 384; *The Emblem*, 2 Ware, 68; *The Boston*, 1 Sumn. 328; *The Hope*, 3 C. Rob. 215.

<sup>2</sup> Adm. Rule 47.

and by process of attachment of the property of the respondent, in case the respondent cannot be found in the district.<sup>1</sup>

A party can only be arrested in a civil cause for damages by virtue of process in the admiralty in such cases where an arrest is allowed by the laws of the state, where the court which issues the process sits, as the statutes of the United States and the rules of the Supreme Court apply as well to admiralty as common law processes,<sup>2</sup> and process to imprison cannot issue to enforce the payment of a decree by stipulators,<sup>3</sup> nor to compel the defendant to enter stipulations in a cause in which he is not liable to arrest;<sup>4</sup> and in suits commenced by warrant of arrest of the person, the stipulators cannot surrender the principal but are liable for the payment of any sum which may be awarded by final decree.<sup>5</sup> The process of attachment is not

<sup>1</sup> Adm. Rule 2.

<sup>2</sup> Adm. Rule 47; *The Carolina*, 14 Fed. Rep. 424; *The Kentucky*, 4 Blatch. 448. See, however, *Gaines v. Travis*, 1 Abb. Adm. 422.

<sup>3</sup> *The Blanche Page*, 16 Blatch. 1; *The Kentucky*, 4 Blatch. 448.

<sup>4</sup> *The Louisiana Ins. Co. v. Nickerson*, 2 Low. 310.

<sup>5</sup> Adm. Rule 3; *Holmes v. Dodge*, 1 Abb. Adm. 60; *Gaines v. Travis*, *Ibid.* 422; *In re Bail of Loring Snow*, 2 Curtis, 485. See *Grace v. Evans*, 3 Ben. 479.

confined to maritime seizures; stocks and credits are attachable by admiralty process without the aid of a statute,<sup>1</sup> but a suit commenced in the admiralty by process of monition to attach freight in the hands of the parties owning it will not prevent the service of a subsequent attachment out of the common law courts at the suit of another creditor of the owner of the ship;<sup>2</sup> as the service of such process of monition is not such an actual seizure of the fund as will prevent a subsequent attachment. But money cannot be attached after payment into the registry of the court.<sup>3</sup> Such process issues in tort as well as in contract.<sup>4</sup>

The admiralty process of attachment by proceedings *in personam* if not identical with, is similar to the attachment on original or mesne process in the common law courts, and is in ana-

<sup>1</sup> *Miller v. The United States*, 11 Wall. 268; *Atkins v. The Disintegrating Co.*, 18 Wall. 272.

<sup>2</sup> *The Olivia A. Carrigan*, 7 Fed. Rep. 507.

<sup>3</sup> *The Lottawana*, 20 Wall. 201.

<sup>4</sup> *Manro v. Almeida*, 10 Wh. 473, was for a tort on the high seas. *Barnes v. The Winchester*, 25 Leg. Int. (Pa.) 196, was an attachment of the claim of the owner under policies of insurance in a cause of collision; the amount was paid into the registry. See Chapter V., Limitation of Liability of Ship-owners. *Bouysson v. Miller, Bee*, 186; *Reed v. Hussey*, 1 Bl. & H. 525; *The Invincible*, 2 Gall. 29, was in tort. *The New Jersey St. Nav. Co. v. The Merchants' Bank*, 6 How. 344.

logy with that under the custom of London.<sup>1</sup> It treats the property attached as that of the respondent, making the garnishee a debtor to the extent of its value.<sup>2</sup> Such attachment of the ship by common law proceedings seizes the interest of the owner after the maritime liens are satisfied, and a sale by an execution under such a seizure conveys only the title of the owner remaining after the maritime liens are satisfied.<sup>3</sup>

In a cause of admiralty jurisdiction in the District Court for the Southern District of New York<sup>4</sup> against a corporation of New Jersey, a prayer for process concluded, "if the defendants should not be found, that an attachment might issue against their property in the district." The process was returned, "Respondents not found in my district, and I attached all the property of the respondents

<sup>1</sup> *Manro v. Almeida*, 10 Wh. 473; *Clarke v. The New Jersey Steam Nav. Co.*, 1 Story, 531; *Barnes v. The Winchester*, 25 Leg. Int. (Pa.) 196; *The Invincible*, 2 Gallison, 29; see, also, *The New Jersey Steam Nav. Co. v. The Merchants' Bank*, 6 How. 344, and *Atkins v. The Disintegrating Co.*, 18 Wall. 272; *Reed v. Hussey*, 1 Bl. & H. 525.

<sup>2</sup> *Reed v. Hussey*, 1 Bl. & H. 525.

<sup>3</sup> *Maxwell v. The Powell*, 1 Woods, 99. In *Taylor v. Carryl*, 20 How. 583, the sale of the ship attached was as perishable and not to satisfy an execution.

<sup>4</sup> *Atkins v. The Disintegrating Co.*, 18 Wall. 272.

found in their factory in Red Hook Point, in the city of Brooklyn." A motion was made to set aside the attachment on the ground that the defendant was not a resident under the 11th section of the Judiciary Act of 1789, providing "that no civil suit shall be brought before either of the said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." It was held that the act did not apply to such civil causes of admiralty and maritime jurisdiction, and supported the right of the admiralty to entertain suits against the respondents by process of attachment *in personam* thus acquired.<sup>1</sup>

<sup>1</sup> According to the return of the marshal, the cause presented the case of a non-resident defendant. On the facts presented on the motion to dismiss under the decisions of the Supreme Court, in *R. R. Co. v. Harris*, 12 Wall. 65; see, also, *Ex parte Schollenberger*, 96 U. S. 369; *The Baltimore & Ohio R. R. Co. v. Galahue*, 12 Grattan (Va.), 655, the company was amenable to the service of process there as a resident, and could have been served with process; see *Newby v. Van Oppen*, L. R. 7 Q. B. 293-6.

A motion had been made in an early stage of the cause to discharge the attachment on the ground that the business of this company was carried on in Brooklyn, in the Eastern District of New York, and that service could have been made on the officers of the company, but was abandoned, and subsequently another motion

Proceedings *in personam* against a foreign corporation having an office in and habitually transacting its business within the district cannot be commenced in the admiralty by an attachment of the property of the corporation within the district where it is resident.<sup>1</sup>

was made to vacate the attachment under the 11th section of the judiciary act, on the opposite ground that the respondents were non-residents, and had not been found in the district, this motion was overruled, and an answer filed, setting up that the defendants were a foreign corporation, not residents of the district in which they were sued. This case, as decided in the Supreme Court, is upon the state of facts, appearing in the answer alleging process issued against a non-resident foreign corporation. In *West v. The Home Ins. Co.*, 18 Fed. Rep. 622, a foreign insurance company transacting business in a state by an agent under the laws of the state, was held not to be absent from the state, under the code of procedure of Oregon.

<sup>1</sup> Morawetz on Private Corporations, §§ 517-24; *Mohr v. The Ins. Co.*, 12 Fed. Rep. 474; see, also, *Harriman v. The Rockaway Beach Pier Co.*, 8 Fed. Rep. 94; s. c., 5 Fed. Rep. 461. The Supreme Court, in 18 Wall. 272, reversed the Circuit Court, *Atkins v. The Fibre Disintegrating Co.*, 7 Blatch. 555, which held that the act of congress applied to civil suits *in personam* in admiralty; as the same reason existed for not compelling a defendant to litigate his case in any other district than that of which he was an inhabitant or found, in suits on the admiralty side of the court as on the common law and equity side. The District Court had decided otherwise, in 1 Ben. 118; see, also, *Cushing v. Laird*, 4 Ben. 70; and such process had issued against a foreign corporation in

§ 118. A question exists whether, independently of the cases provided for by the rules of practice of the Supreme Court, a proceeding *in personam* can be joined with one *in rem* in the same libel.<sup>1</sup> The remedies are, however, generally separate and cumulative.<sup>2</sup>

Mr. Justice Story says:<sup>3</sup> "In cases of collision the injured party may proceed *in rem* or *in personam*, or successively in each way, but I do not understand how the proceedings can be blended in one libel." Other authorities do not sustain this view.<sup>4</sup> The flexibility of admiralty procedure is such that the Supreme Court of the United

The New Jersey St. Nav. Co. v. The Merchants' Bank, 6 How. 344; but the right to issue such process was not raised. It had been decided otherwise in the District Court of California, in Wilson v. Pierce, 15 Monthly Law Rep. 137, followed in Blair v. Bemis, cited in 4 Ben. at p. 86.

<sup>1</sup> The Clatsop Chief, 8 Fed. Rep. 163; *contra*, The Alida, 12 Fed. Rep. 343.

<sup>2</sup> The Prince Albert, 5 Ben. 386; Atlantic Mutual Ins. Co. v. Alexandre, 16 Fed. Rep. 279; The Zodiac, 5 Fed. Rep. 220; The Clatsop Chief, 8 Fed. Rep. 163. Where prior proceedings *in rem* had been instituted abroad, proceedings *in rem* for the same cause of action were suspended until after the hearing of the cause; The Peshawur, L. R. 8 P. D. 32.

<sup>3</sup> Citizens' Bank v. The Nantucket Steamboat Co., 2 Story, 16.

<sup>4</sup> Ben. Adm. Prac., § 397; Betts's Adm. Prac., p. 89; Curtis, J., in The Enterprise, 2 Curtis, 317.

States has expressly by rule authorized proceedings *in rem* to be joined with proceedings *in personam* against the master in causes of mariner's wages,<sup>1</sup> pilotage,<sup>2</sup> and collision,<sup>3</sup> and it would therefore appear that there is no such inconsistency in the nature of the two processes as forbids joinder in the same suit,<sup>4</sup> and the rule generally adopted is that, unless when actually restricted by the rules of the Supreme Court, the proceedings may be joined,<sup>5</sup> in order to avoid the expense of another action, if the decree *in rem* should prove fruitless.<sup>6</sup>

Proceedings *in rem* have by amendment been changed into proceedings *in personam* where it was necessary to give relief.

In *The Virgin*<sup>7</sup> the Circuit Court held the bottomry bond to be invalid, but changed the proceedings from one *in rem* to one *in personam* for the amount of the supplies furnished to the master, as if the suit had been originally brought *in perso-*

<sup>1</sup> Adm. Rule 13.

<sup>2</sup> Adm. Rule 14.

<sup>3</sup> Adm. Rule 15.

<sup>4</sup> See *Newell v. Norton*, 3 Wall. 257.

<sup>5</sup> *Hussey v. Reed*, 1 Blatch. & H. 525; *The Monte A.*, 12 Fed. Rep. 331; *The Clatsop Chief*, 8 Fed. Rep. 163; *The J. F. Warner*, 22 Fed. Rep. 342; 630 Casks of Sherry Wine, 14 Blatch. 517; s. c., 7 Ben. 506; *The Zenobia*, 1 Abb. Adm. 48.

<sup>6</sup> *The Zenobia*, 1 Abb. Adm. 48; *contra*, *The Alida*, 12 Fed. Rep. 343.

<sup>7</sup> 8 Peters, 538.



*nam.* The Supreme Court reversed the decree holding the bond to be valid but declined to consider whether a decree *in personam* could be rendered in a proceeding *in rem*.

In *Chamberlain v. Ward*,<sup>1</sup> where proceedings were excepted to, on the ground of a joinder of a libel *in rem* with a prayer for relief against the owners in a cause of collision, the exception was sustained, and the libellants were permitted to change the proceedings to the form of a suit *in personam* against the owners, and the cause was adjudicated as a proceeding *in personam*.

The ordinary practice, however, does not permit a personal judgment to be entered in a libel *in rem* against claimants and owners, unless after proper amendments have been allowed, and notice to parties who have appeared as claimants in the proceedings *in rem*,<sup>2</sup> and such amendments will not be allowed as would be a violation of the rules of the Supreme Court which are construed to forbid the joinder of the two remedies against the owner and the vessel in collision or in salvage.<sup>3</sup>

<sup>1</sup> 21 How. 548.

<sup>2</sup> *The Monte A.*, 12 Fed. Rep. 331; *The Zodiac*, 5 Fed. Rep. 220; *The Enterprise*, 2 Curtis, 317.

<sup>3</sup> Adm. Rules 15-19; *The Zodiac*, 5 Fed. Rep. 220; *The Clatsop Chief*, 8 Fed. Rep. 163; *Newell v. Norton*, 3 Wall. 257; *The Sabine*, 101 U. S. 384.

The same adaptability of the proceedings in admiralty to meet the exigencies of a case, independently of the form of the averments where a cause of action is shown to exist, appears in *Dupont v. Vance*,<sup>1</sup> where in an action for the non-delivery of cargo which had been jettisoned, the court awarded the libellant the proportion payable by the owners of the ship for the cargo, it being shown that the loss was by a peril of the sea.

§ 119. The pendency of a suit for the same cause of action in the state courts is not a bar to proceedings *in rem* in the admiralty.<sup>2</sup>

And a plea in abatement of a suit pending for the same cause of action between the same parties in a foreign jurisdiction is of no avail.<sup>3</sup> But in such cases whichever first ripens into judgment becomes effective, and may then be allowed to be set up against the further prosecution of the other action,<sup>4</sup> and the judgment rendered against the

<sup>1</sup> 19 How. 162; *Sonsmith v. The J. P. Donaldson*, 21 Fed. Rep. 671.

<sup>2</sup> *The Prince Albert*, 5 Ben. 386; *The Tubal Cain*, 9 Fed. Rep. 834; *The Peshawur*, L. R. 8 P. D. 32; *The Atlantic Mut. Ins. Co. v. Alexandre*, 16 Fed. Rep. 279.

<sup>3</sup> *Wadleigh v. Veazie*, 8 Sumner, 165; *Loring v. Marsh*, 2 Cliff. 311.

<sup>4</sup> *Goodrich v. The City*, 5 Wall. 566; *The Tubal Cain*, 9 Fed. Rep. 834.

owners of a vessel in a suit to charge them personally with the penalties incurred for carrying a greater number of passengers than that allowed by her certificate, is not conclusive in a subsequent suit *in rem* against the vessel to enforce the lien for the penalties, where the vendees of the original defendant were claimants and defended the suit.<sup>1</sup>

An attachment of property in a suit *in personam* against the absent owners of a vessel should not be allowed where the claim is fully secured by the bond or stipulation given on arrest of their vessel in a previous proceeding *in rem*.<sup>2</sup>

§ 120. The right of a suitor to intervene for his interest in a fund, although the admiralty had no original jurisdiction of the cause of action from which his intervention arises, is one which is now uniformly recognized.

The right is exercised in suits against remnants remaining after the satisfaction of maritime liens which the court distributes among those who have vested interests in the order of their several priorities, no matter how the claims originate.<sup>3</sup>

Mr. Justice Bradley, in *The Lottawana*,<sup>4</sup> says:

<sup>1</sup> *The Boston*, 8 Fed. Rep. 628.

<sup>2</sup> *Atlantic Mut. Ins. Co. v. Alexandre*, 16 Fed. Rep. 279.

<sup>3</sup> *Schuchardt v. The Angelique*, 19 How. 239.

<sup>4</sup> 21 Wall. 558-582.

"It is a wholesome jurisdiction very commonly exercised by nearly all superior courts, to distribute a fund rightfully in its possession to those who are legally entitled to it; and there is no sound reason why admiralty courts should not do the same. If a case should be so complicated as to require the interposition of a court of equity, the District Court could refuse to act, and refer the parties to a more competent tribunal." And this principle was approved and acted upon in *The Guiding Star*,<sup>1</sup> and reaffirmed in *The E. V. Mundy*,<sup>2</sup> and is the origin of the 43d admiralty rule.

A court, proceeding by a sale *in rem*, necessarily discharges all vested rights, whether of a maritime nature or otherwise, and must recognize in its adjudication the rights which it disturbs, although it had no jurisdiction originally to enforce them. And in the same manner, on a sale of a vessel, as perishable to protect all interests, a state court having obtained jurisdiction of the *res*, or fund, and which sells the property as perishable, must enforce such claims against it as it could not enforce originally by proceedings *in rem* and would observe the priorities given by the maritime law to the liens which were discharged by its proceedings.

<sup>1</sup> 18 Fed. Rep. 263.

<sup>2</sup> 22 Fed. Rep. 173.

This is believed to be the principle on which *Taylor v. Carryl*<sup>1</sup> was decided in the Supreme Court of the United States, a rule which is essential to prevent the conflict over the same subject by courts of equal jurisdiction.

§ 121. Mr. Justice Story describes the proceedings *in rem* as the peculiar process of admiralty to enforce the maritime *jus in re*, and as the only one capable of enforcing it,<sup>2</sup> and his definition is followed by the English courts.<sup>3</sup>

Although the right to process *in rem* is spoken of in two cases,<sup>4</sup> as involving the jurisdiction of the admiralty, and the right to issue process *in rem* is denied to the state courts in maritime causes, because it would be an invasion of the exclusive jurisdiction of the admiralty courts under the judiciary act of 1789, the principle asserted in *The St. Lawrence*,<sup>5</sup> that the allowance of process *in rem* by the admiralty courts is a question of procedure, is sustained in other cases; and the right of

<sup>1</sup> 20 How. 583.

<sup>2</sup> Story on Bailments, § 607.

<sup>3</sup> *Jessel, M. R., in the City of Mecca*, L. R. 6 P. D. 106; *Sir John Jervis, in The Bold Buccleugh*, 7 Moo. P. C. C. 267.

<sup>4</sup> *The Rock Island Bridge*, 6 Wall. 213; *Cutler v. Rae*, 7 How. 729.

<sup>5</sup> 1 Black, 522.

the court to its exercise, is solely one of procedure or remedy, and not of jurisdiction.<sup>1</sup>

§ 122. In proceedings *in rem* the allowance of the writ is the act of the law, so that no damages are allowed for the arrest and detention of the vessel when the libel is dismissed, except, perhaps, in causes of possession,<sup>2</sup> unless there is bad faith or deceit practised in order to obtain the allowance of process.<sup>3</sup> A separate action will not lie to recover damages for the arrest and detention of a vessel under a libel which was allowed on the statement of facts contained therein, but which was subsequently dismissed for want of jurisdiction.<sup>4</sup> The stipulation for costs is the only security required of the libellant to indemnify the owner for the arrest of his vessel either in the original suit or after an appeal; and when the libel is dismissed for want of

<sup>1</sup> *Ex parte* Gordon, 104 U. S. 515; *Ex parte* Ferry Co., *ibid.* 519; *Ex parte* Hagar, *ibid.* 520; see *post*, Prohibition, Chap. VII.

<sup>2</sup> *The John*, 2 Hagg. p. 317.

<sup>3</sup> *The Adolph*, 5 Fed. Rep. 114; *The Oriole*, Olcott, 67; *The Evangelismos*, Swabey, 378; s. c., 12 Moore, P. C. C. 358; *The D. H. Peri*, Lush. 543; *The Strathnaver*, L. R. 1 App. Cases, 58; *The Active*, 5 Law Times (N. S.), 773; *The Amelia*, 1 Moore, P. C. C. (N. S.) 471.

<sup>4</sup> *Thompson v. Lyle*, 3 W. & S. (Pa.) 166; see as to the effect of want of probable cause in proceedings for forfeitures, *The Apollon*, 9 Wheat. 362.

jurisdiction appearing upon the face of the proceedings, the court will not even award costs;<sup>1</sup> so that if the facts are truly alleged in the libel no redress is given to the owner for a mistake in the allowance of process to arrest his vessel. On the other hand, the owner of the property arrested can only obtain its release on giving stipulation for the full value of the property arrested after appraisement,<sup>2</sup> or in such sum as shall be required, to abide by and pay the money awarded by the final decree, rendered by the court or any appellate court.<sup>3</sup>

§ 123. In proceedings *in rem*, where the property or vessel has been released, the bond or stipulation for value, taken in accordance with the course of courts in admiralty proceedings, becomes a substitute for the vessel or *res* which is released to the claimant.<sup>4</sup> But the giving of such stipulation to obtain a release of the vessel is not a waiver of any question as to the original liability of the vessel. It only takes the place of the vessel for all the purposes of the trial.<sup>5</sup>

This stipulation may be taken by the court for

<sup>1</sup> The *McDonald*, 4 Blatch. 477; *Hornthall v. The Collector*, 9 Wall. 560.

<sup>2</sup> Admiralty Rule 11.

<sup>3</sup> Admiralty Rule 10.

<sup>4</sup> The *Collector*, 6 Wh. 194; The *Lucille*, 19 Wall. 73; The *Lady Pike*, 96 U. S. 461.

<sup>5</sup> The *Fidelity*, 16 Blatch. 569; The *Orpheus*, 3 Ware, 143.

the whole value of the vessel, or in sufficient amount to cover the libellant's claim.<sup>1</sup> In the latter case the vessel returns into the hands of her owner subject to all other liens incurred except that for which it was seized.<sup>2</sup>

§ 124. The bond given to discharge the vessel from arrest is taken under the power inherent in the courts of the admiralty to release a vessel arrested, on a stipulation being filed by claimant with sureties in an amount sufficient to secure the claim for which the vessel was arrested.<sup>3</sup> But the claimant will not be entitled to have the vessel discharged from arrest, where it would defeat the very object of the suit,<sup>4</sup> as in the case of a seizure to enforce the neutrality laws, and in actions of possession between part-owners. In causes of possession the vessel cannot be released on bail, but the court will expedite the hearing of the case, and of the appeal.<sup>5</sup>

The stipulators become liable for the performance by the claimant of the orders and decrees of

<sup>1</sup> Admiralty Rule 11.

<sup>2</sup> *The Union*, 4 Blatch. 90; *Roberts v. The Huntsville*, 3 Woods, 386.

<sup>3</sup> *The Alligator*, 1 Gall. 145; *The Wanata*, 95 U. S. 600-616; *U. S. v. Ames*, 99 U. S. 35.

<sup>4</sup> *The Mary N. Hogan*, 17 Fed. Rep. 813.

<sup>5</sup> *The Brisk*, 4 Ben. 252; *The John*, 2 Hagg. 305.



the court in which the stipulation is taken, or of any appellate court, to which the cause may be removed, and a decree may be entered against the stipulators on the bond for value, taken by the District Court, on the restoration of the vessel to the claimant, after a mandate from the Supreme Court to the Circuit Court to which the cause was removed on appeal from the District Court.<sup>1</sup> An amendment of the pleadings, which does not increase or diminish the liability of the stipulators, will not discharge them as sureties on the bond to release the vessel.<sup>2</sup>

§ 125. The owner of property in a suit *in rem* is not recognized as a party until he comes in, makes a claim, and defends.<sup>3</sup>

A vessel arrested by the holders of maritime liens may be delivered to any person showing a just title, although some one who is notified and does not choose to appear, may have an equal or even better right to the immediate possession.<sup>4</sup> So that where charterers in possession failed to

<sup>1</sup> *The Lady Pike*, 96 U. S. 461.

<sup>2</sup> *Newell v. Norton*, 3 Wall. 257.

<sup>3</sup> *The J. W. French*, 13 Fed. Rep. 916; *The Two Marys*, 12 Fed. Rep. 152; *Atlantic Mut. Ins. Co. v. Alexandre*, 16 Fed. Rep. 279.

<sup>4</sup> *The Prometheus*, 1 Low. 491.

appear and defend in a suit in which the general owners were not personally liable, the court ordered the vessel to be delivered to the latter on their intervening as claimants, and giving stipulation.<sup>1</sup>

When a claim is to be made in the admiralty, the owners should do it, if practicable, but it is in the power of the court to permit a representative of the owner to intervene and claim and answer.<sup>2</sup> Such a claimant, by taking part in the suit, renders himself liable for the payment of costs, although he has not become a party to the stipulation,<sup>3</sup> and a claimant who has received the vessel on stipulation to pay into court its appraised value cannot insist on an allowance, because it was of less value in his hands by reason of liens, diminishing the value of the ship as the source for the payment of a bottomry bond.<sup>4</sup> The right of the claimant to take part in the proceedings may be contested; but it must be by an exceptive allegation in the admiralty.<sup>5</sup> If the claimant is admitted without objection, and allegations or pleadings to the merits are subsequently put in,

<sup>1</sup> Ibid.

<sup>2</sup> Per Curtis, J., *In re Stover*, 1 Curtis, 201; *The Adeline*, 9 Cranch, 244; *The Sally*, 1 Gall. 401; *The Lively*, *ibid.* 315.

<sup>3</sup> *In re Stover*, *supra*.

<sup>4</sup> *The Virgin*, 8 Peters, 538.

<sup>5</sup> *The U. S. v. 422 Casks of Wine*, 1 Peters, at p. 550.

it is an admission that the claimant is rightly in court and capable of contesting the merits.<sup>1</sup> But the rightful owner can at any time be permitted to appear and obtain restitution of the property to him as against the claimant of record.<sup>2</sup> A person who becomes a party to a suit by entering stipulation for the release of the vessel without entering a formal claim cannot take advantage of such neglect to prevent a decree being entered against him as a stipulator.<sup>3</sup>

No decree can be entered in a proceeding *in rem* under the 21st Admiralty Rule against a claimant of the vessel, who has not signed the stipulation for its release.<sup>4</sup> While the claim is an admission of ownership at the time of the arrest, it is not of such an ownership as would render the claimant personally responsible for a collision, as in the case of a claim by the owner, where the charterer became the owner *pro hac vice* for the voyage in which the collision occurred.<sup>5</sup>

§ 126. A suit does not abate by the death of a claimant, nor will the death of a claimant render

<sup>1</sup> Ibid.

<sup>2</sup> Ibid.

<sup>3</sup> The *Tulchen*, 2 Fed. Rep. 600.

<sup>4</sup> *Atlantic Mut. Ins. Co. v. Alexandre*, 16 Fed. Rep. 279; *U. S. v. Ames*, 99 U. S. 35; *The Gran Para*, 10 Wh. 497; *The Zodiac*, 5 Fed. Rep. 220.

<sup>5</sup> *The Zodiac*, 3 Fed. Rep. 220.

a subsequent decree erroneous. The personal representatives of the deceased may make themselves parties to the cause,<sup>1</sup> and foreign administrators may intervene for their interest in a suit without taking out letters of administration in the state in which the admiralty court sits.<sup>2</sup> The death of one of the stipulators will not prevent the entry of a decree against a surviving stipulator, on the suggestion of death of the other.<sup>3</sup>

§ 127. The stipulator is a surety for the claimant, who by entering into the bond becomes individually liable in that cause of action in which he makes claim. Such personal liability does not necessarily arise from the actual ownership by the claimant of the vessel which incurs a maritime lien, as where the whole vessel is chartered to another who sails and provides the funds, or to the master who sails the vessel on shares. The claimant may be master, owner, or a foreign consul,<sup>4</sup> and the stipulators are the sureties of the claimant,

<sup>1</sup> *The James A. Wright*, 10 Blatch. 160; *Penhallow v. Doane*, 3 Dall. 54.

<sup>2</sup> *The Boston*, 1 Bl. & H. 309.

<sup>3</sup> *The James A. Wright*, 10 Blatch. 160.

<sup>4</sup> *The Malek Adhel*, 2 How. 210; *The U. S. v. Ames*, 99 U. S. 35; *The Freeman v. Buckingham*, 18 How. 182; *Leary v. The U. S.*, 14 Wall. 607; *The Wanata*, 95 U. S. 600.

who becomes a principal by entering into the stipulation.<sup>1</sup>

No liability can be incurred in proceedings *in rem* beyond the amount of the stipulation given for the release of the vessel, even if the claimant is the owner,<sup>2</sup> and interest cannot be added to the amount of the stipulation which represents the value of the vessel when seized.<sup>3</sup>

The act of 1847, permitting a bond with sureties to be taken by the marshal, provides that the court may enter a decree, and award execution at the same time against the principal and his sureties on the bond given for the release.<sup>4</sup> The same power exists as to stipulation taken by the court on the release of the vessel to the claimant.<sup>5</sup>

Judge Story says that it is the ordinary process in admiralty to enforce the stipulation, and that independently of any statute the admiralty court is fully authorized by its procedures to take a *fidejussory* caution, or stipulation, on delivery of the property to the claimant in cases *in rem*, and may, in a summary manner, render judgment and award

<sup>1</sup> The Ann Caroline, 2 Wall. 538; The Wanata, 95 U. S. 600.

<sup>2</sup> The Webb, 14 Wall. 406; Brown v. Burrows, 2 Blatch. 340.

<sup>3</sup> The Ann Caroline, 2 Wall. 538.

<sup>4</sup> Rev. Stat. § 941; see, also, Admiralty Rule 21.

<sup>5</sup> *Ex parte* Warden, 13 W. N. C. (Pa.) 195.

execution to the prevailing party, whether the security is taken by a sealed instrument or by a stipulation, in the nature of a recognizance, and may by monition, attachment, or execution, enforce its decision against all who become parties.<sup>1</sup>

There is no necessity for a separate suit or proceeding to enforce the liability of the stipulators.<sup>2</sup> The bail in admiralty are said to be treated as principals, "because the plaintiff and defendant being seafaring men, are, more than others, subject to casualties."<sup>3</sup>

§ 128. When a decree is entered against a stipulator, it becomes final according to the same principles which govern in actions *in personam*. The only remedy for the stipulators is by an appeal from the decree so entered.<sup>4</sup> The issuing of an execution on such a decree, where the right of appeal had been lost, is not the subject of an appeal.<sup>5</sup>

The decree is *in rem* against the vessel which has been released, and is enforced by an award that the stipulators or sureties do make good their stipulation to the effect that the claimant shall fulfil

<sup>1</sup> *The Alligator*, 1 Gall. 145; *U. S. v. Ames*, 99 U. S. 35; *The Wanata*, 95 U. S. 600.

<sup>2</sup> *The Alligator*, 1 Gall. 145.

<sup>3</sup> *Betts v. Hancock*, 1 Salk. 33; *The City of Norwich*, 1 Ben. 89.

<sup>4</sup> *The Elmira*, 16 Fed. Rep. 133.

<sup>5</sup> *Ibid.*; *The Hollen*, 1 Mason, 431.

the orders and decrees of the court in relation to the *res*.<sup>1</sup> The claimant's bond or stipulation as principal with sureties becomes in all respects a substitute for the *res*, and of its liability growing out of its contacts and torts, so that the personal liability of the owner cannot be enforced in such proceedings by showing that others were partners with the claimant in the ownership of the property released.<sup>2</sup> Nor is there any personal liability in that cause on the part of the claimant, who has not become a party to the stipulation.<sup>3</sup>

§ 129. The ship or *res* when released under such stipulation cannot be rearrested for the same cause, as the stipulation like the claim-property bond given in replevin, revests the title in the claimant, clear of the maritime lien, and acts as a purgation of that particular lien<sup>4</sup> in the same manner as a

<sup>1</sup> See form of decree *in rem* against stipulators in *The Virgin*, 8 Peters, 538; see, also, *The Gran Para*, 10 Wheaton, 497; *The Wanata*, 95 U. S. 600; *The New Orleans*, 17 Blatch. 216; *The Blanche Page*, 17 Blatch. 221.

<sup>2</sup> *The U. S. v. Ames*, 99 U. S. 35.

<sup>3</sup> *The Gran Para*, 10 Wh. 497.

<sup>4</sup> *The Thales*, 3 Ben. 327; s. c., 10 Blatch. 203; *The White Squall*, 4 Blatch. 103. A bond given in an action of replevin changes the property; *Woglam v. Cowperthwaite*, 2 Dall. 68; *Frey v. Leeper*, 2 Dall. 131; *Bradyce v. Ball*, 1 Br. Ch. 427; *Fisher v. Whoollery*, 25 Penn. St. 197.

stipulation given for value in proceedings to limit the liability of ship-owners, is a purgation of all claims against the vessel and the owners.<sup>1</sup>

The giving of a bond for value not only releases the vessel from arrest, but also discharges the lien; so that where the vessel is discharged from arrest, and returns into the hands of the owners, it cannot be arrested a second time for the same cause of action after the discontinuance of the first libel and costs paid and accepted by claimant.<sup>2</sup> And where the master of a vessel as bailee had instituted a suit on behalf of the owners of the vessel, and also of the owner's cargo on board, for damages, under which the vessel charged with fault was arrested and released upon stipulation being given to answer the claim in that suit; the vessel so released could not be arrested a second time at the suit of the owners of the cargo.<sup>3</sup> The proper course for the owner of the cargo, if he desires to become personally a party to the suit,

<sup>1</sup> *Ante*, Chap. V. § 94.

<sup>2</sup> *The Union*, 4 Blatch. 90; *The White Squall*, *ibid.* 103; *The Thales*, 3 Ben. 327; *Ibid.* 10 Blatch. 203; *The Kalamazoo*, 9 Eng. L. & Eq. R. 557; *Home Ins. Co. v. The Keokuk*, 2 Chic. Leg. News, 249; *The Nahor*, 9 Fed. Rep. 213; *The William Murtagh*, 17 Fed. Rep. 259.

<sup>3</sup> *The Nahor*, 9 Fed. Rep. 213.



is to petition to be made a co-libellant.<sup>1</sup> A stipulator who satisfies the decree against the claimant cannot rearrest the vessel for the debt of the principal; as the lien was discharged by the bond taken, and the vessel could not be rearrested in the same cause, and no right of subrogation therefore exists in favor of the stipulator against the vessel.<sup>2</sup>

The same effect is given to an arrest under a lien given by the statute of a state for repairs at a domestic port, the vessel cannot be arrested in the admiralty for the same cause of action, as the giving of the bond under the state law, even if that law was invalid, operated as a discharge of the lien.<sup>3</sup>

Although it was said in *The Union*,<sup>4</sup> by Nel-

<sup>1</sup> *Ibid.*; *The William Murtagh*, 17 Fed Rep. 259.

<sup>2</sup> *The Robertson*, 8 Biss. 180. In *Roberts v. The Huntsville*, 3 Woods, 386, the vessel had been released on an arrest for salvage incurred, and was in the possession of the stipulators as factors, who filed a libel for advances and for indemnity as stipulators. They were denied priority to mortgages. Mr. Justice Bradley points out that the salvors could not rearrest the vessel, and therefore those claiming by subrogation also could not. While one who advances money to a master or owner to pay a debt for which the vessel is in custody is subrogated to the securities of the creditor on the vessel when not released on stipulation as the lien has not been discharged. *The Hoyle*, 4 Biss. 234; *The Isaac May*, 21 Fed. Rep. 687.

<sup>3</sup> *The Edith*, 94 U. S. 518. *Ante*, p. 22.

<sup>4</sup> 4 Blatch. 90.

son, J., that if there has been any mistake or fraud committed in entering into the stipulation, and the vessel has been improvidently discharged, it would be competent for the court to relieve the parties concerned, on an application within a reasonable time, by ordering the vessel back into the custody of the officer.<sup>1</sup>

In a subsequent case, an order to surrender the vessel to the marshal by consent of the parties to the cause was declared by the same court to have been improvidently granted as against a person claiming an interest in the vessel subsequently acquired, and the court declared that it had no authority to order a vessel back into the custody of the marshal, which has been fairly discharged from arrest on stipulation.<sup>2</sup>

It has been suggested that in the case of fraud, misrepresentation, or manifest error in the court in accepting stipulations the release of the vessel may be recalled.<sup>3</sup> It is doubtful, however, whether the rearrest of the vessel in any case is permissible where the rights of third parties have intervened; and the later rule is that on the insolvency of the

<sup>1</sup> See, also, *The Virgo*, 13 Blatch. 255; *The Hero*, Br. & Lush. 447; *The Duchesse de Brabant*, Swabey, 264; *The Flora*, L. R. 1 A. & E. 45.

<sup>2</sup> *The White Squall*, 4 Blatch. 103.

<sup>3</sup> *U. S. v. Ames*, 99 U. S. at pp. 44, 47.

stipulators, or insufficiency of the bond, the vessel cannot be rearrested, and the only redress is by striking off the defence, unless the claimant makes good his stipulation.<sup>1</sup>

It has also been held that where a vessel while in custody of the marshal, under proceedings to enforce a *jus in re*, is destroyed without any fault of the claimant or debtor, the destruction of the *res* is a payment of the debt to the extent of its value.<sup>2</sup> Where, however, a vessel is improperly removed from custody, a decree of the Circuit Court may be enforced by a libel *in rem* against the vessel in another district.<sup>3</sup> But the court will not, by summary proceedings, restore the custody of the vessel to a party to whom it had been delivered on bond or stipulation, and from whom it had been forcibly taken. When the decree is fulfilled, and the property is delivered, it passes out of the control of the court, and its possession must be maintained as if it had come from any other source.<sup>4</sup>

§ 130. The admiralty decree *in personam* for the

<sup>1</sup> The *Virgo*, 13 Blatch. 255; The *White Squall*, 4 Blatch. 103; The *Thales*, 10 Blatch. 203; The *City of Hartford*, 11 Fed. Rep. 89.

<sup>2</sup> The *Flavilla*, 17 Fed. Rep. 399.

<sup>3</sup> The *Rio Grande*, 23 Wall. 458.

<sup>4</sup> U. S. *ex rel. v. Towns*, 7 Ben. 444.

payment of money, or when entered against the stipulators in proceedings *in rem*, becomes a lien upon the real estate of the defendants according to the law of the state in which the court which renders the decree sits.<sup>1</sup> In *Ward v. Chamberlain* the decision was under the process act of May 19, 1828.<sup>2</sup> The case was a proceeding *in personam* in

<sup>1</sup> *Ward v. Chamberlain*, 2 Black. 430; *Cropsey v. Crandall*, 2 Blatch. 341.

<sup>2</sup> Rev. Stat. § 988. Story's Laws, vol. 4, ch. 68, section 3. "Writs of execution and other final process issued on judgments and decrees, rendered in any of the courts of the United States, and the proceedings thereupon shall be the same, except their style, in each state respectively, as are now used in the courts of such state, etc., provided, however, that it shall be in the power of the courts, if they see fit in their discretion, by rules of court, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislature of the respective states for the state courts." The 1st section refers to the assimilation of forms of mesne process in courts of the U. S. admitted since Sept. 29th, 1789, Rev. Stat. § 943, the admiralty process shall be "according to the principles, rules, and usages which belong to courts of admiralty as contradistinguished from courts of common law, except so far as may have been otherwise provided for by acts of congress." In the dissenting opinion of two of the justices, Grier and Catron, the creation of such a lien is protested against as an innovation in admiralty procedure, and as disregarding the principles, rules, and usages of courts of admiralty as contradistinguished from a court of common law, and as tending to produce a conflict with the state courts which

which the difference between the proceeding in admiralty and at common law, or in equity, is only one of form of procedure.<sup>1</sup>

But an execution which can be enforced against the respondents *in personam* must be equally enforceable in a decree for the payment of money against the claimants and his stipulators, in proceedings *in rem* under the act of congress of March 3, 1847.<sup>2</sup> The original 21st Rule,<sup>3</sup> as adopted in 1845, which did not provide for an execution against land, was subsequently altered so as to read: "In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a *fieri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendant or stipulators,"<sup>4</sup> and the real estate of a stipulator is subject to an execution in admiralty.<sup>5</sup>

may refuse to recognize titles to land obtained through the process of maritime courts. The opinion denied the right of admiralty to have execution of lands.

<sup>1</sup> *Cropsey v. Crandall*, 2 Blatch. 341, was also *in personam*.

<sup>2</sup> Rev. Stat. § 941, in which the parties are called principal and sureties.

<sup>3</sup> 3 How. VII.

<sup>4</sup> Adm. Rule 21.

<sup>5</sup> *The Kentucky*, 4 Blatch. 448.

The act of congress of July 4, 1840,<sup>1</sup> which provides that decrees of a Circuit or District Court within any state shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of courts of such state cease by law to be liens thereon, applies to the admiralty as it is a court of record.<sup>2</sup>

§ 131. Such decrees will become liens against the real estate of the stipulators as well as that of the claimants and of the defendants in actions *in personam* from the time of the entry of such decrees against parties defendant, claimant and sureties.<sup>3</sup> Within the time within which the appeal can become a supersedeas a decree can be entered against the stipulators and the claimant,<sup>4</sup> although an appeal vacates the decree.<sup>5</sup> The entry of such a decree is however decided in the Supreme Court of the United States in *Ex parte Warden*<sup>6</sup> to be an act of judicial discretion, without deciding whether the lien on real estate by such decree

<sup>1</sup> Rev. Stat. § 967.

<sup>2</sup> *Brown v. Bridge*, 106 Mass. 563; *Thompson v. Lyle*, 3 W. & S. (Pa.) 166.

<sup>3</sup> *The Belgenland*, 108 U. S. 153, s. c. *Ex parte Warden*, 13 W. N. C. (Pa.) 195.

<sup>4</sup> *Ibid.*

<sup>5</sup> *The Lucille*, 19 Wall. 73.

<sup>6</sup> *Supra.*

was vacated by the entry of an appeal within ten days, perfected by giving bond for an appeal.<sup>1</sup> On the other hand, as the obligation of the sureties in the bond given for an appeal is only that the appellants will perform any order or decree of the court or of any appellate court, it has been held that under the act of congress regulating appeals, no decree or judgment can be entered against the sureties on the bond for an appeal, within the time within which an appeal may be taken which would be a supersedeas, and that where no appeal lies, the decree may be entered at once on the stipulation.<sup>2</sup>

<sup>1</sup> See *Dutcher v. Woodhull*, 7 Ben. 313.

<sup>2</sup> *The New Orleans*, 17 Blatch. 216; *The Blanche Page*, *ibid.* 221; see also *The General Pinkney* (*Yeaton v. The U. S.*), 5 Cranch. 281; *U. S. v. Preston*, 3 Pet. at 66; *Wiscart v. D'Auchy*, 3 Dall. 321; *The Lucille*, 9 Wall. 73. In *Chamberlain v. Ward*, 2 Black, 430, the decree against the sureties was entered by the Circuit Court after a mandate was sent down from the Supreme Court. See also *Ex parte Sawyer*, 21 Wall. 235. The form of the decree in *The Virgin*, 8 Pet. 538, is as follows: "This cause came on to be heard . . . on consideration whereof, it is declared by this court, that the bottomry bond in the case stated is, and ought to be held valid for the sum of \$2900 . . . due to the libellant for expenditures and advances absolutely necessary and made in the course of the usual employment of the said ship *Virgin*, and also for the additional sum of ten per cent., the maritime interest agreed on, and payable by the terms of the said bottomry bond, amounting in the whole to the sum of \$3190. . . . And this court further proceeding to render such decree as the Circuit Court

§ 132. Actual seizure is necessary to the exercise of the jurisdiction of the court by proceedings *in rem*.<sup>1</sup> Consent of parties cannot give jurisdiction *in rem*; while an appearance for an absent defendant in proceedings *in personam* gives jurisdiction, and cures all defects.<sup>2</sup> Immovables are

ought to have rendered in the premises, it is further ordered, adjudged, and decreed, that the said claimant Graf do forthwith pay into the said Circuit Court the sum of \$1800, being the amount of the appraised value of the said ship Virgin, delivered to him on stipulation as in the proceedings mentioned, together with interest, . . . with the costs of the district and circuit courts, and unless he shall do so within ten days after the said circuit court shall require the same to be done, that execution do issue in due form of law upon the stipulation aforesaid, against all the parties thereto." Under this form of decree, probably drawn by Story, J., the decree would become a lien only when an execution can issue against the sureties, as the lien only arises from liability to execution.

<sup>1</sup> Admiralty Rule 9.

<sup>2</sup> *Knox v. Summers*, 3 Cranch, 496; *Pollard v. Dwight*, 4 Cranch, 421; *Atkins v. The Disintegrating Co.*, 18 Wall. 272. In *The M. Moxham*, L. R. 1 P. D. 107, an English vessel had been arrested in Spain for damage done to a pier situated in a Spanish port, owned by an English company. It was released on an agreement between the parties that the remedies between the ship and the owner should be tried in England. The court of appeal held that "such an agreement would give jurisdiction by contract, not only jurisdiction by consent, and it must be taken that the parties have agreed that their ship would be liable here in the same way as she would have been liable according to the law of Spain."



not the subject of proceedings *in rem*.<sup>1</sup> To give jurisdiction *in rem* the subject proceeded against must be within the jurisdiction of the court, and there must be an actual seizure and control of the *res* by the marshal, otherwise the admiralty has no jurisdiction.<sup>2</sup> The mere filing of a libel without seizure of the vessel is not even constructive notice of the existence of a lien.<sup>3</sup> Seizure has the same effect as to all persons claiming any interest in the vessel as actual service of process on the owner in actions *in personam*. It is notice to all the world,<sup>4</sup> and the jurisdiction thus obtained cannot be defeated by a subsequent improper removal of the vessel.<sup>5</sup> It is the *locus rei sitæ* which gives jurisdiction to the court of a par-

<sup>1</sup> The Rock Island Bridge, 6 Wall. 213; Harriman v. The Rockaway Beach Pier Co., 5 Fed. Rep. 461.

<sup>2</sup> The Ann, 9 Cranch, 289; Taylor v. Carryl, 20 How. 583; Slocum v. Mayberry, 2 Wh. 1; Gelston v. Hoyt, 3 Wh. 246; The Fideliter, 1 Abb. Rep. 577; Miller v. The U. S., 11 Wall. at p. 299; The Robert Fulton, 1 Paine, 620; The Commerce, 1 Black, 574; U. S. v. One Raft of Timber, 13 Fed. Rep. 796; The Gazelle, 1 Sprague, 378; U. S. v. The Betsey & Charlotte, 4 Cranch, 443.

<sup>3</sup> The Robert Gaskin, 9 Fed. Rep. 62.

<sup>4</sup> Taylor v. Carryl, 20 How. 583; Daily v. Doe, 3 Fed. Rep. 903; The Ann, 8 Fed. Rep. 923.

<sup>5</sup> The Rio Grande, 23 Wall. 458; *Ex parte* Devoe Manufacturing Co., 108 U. S. 401; The L. W. Eaton, 9 Ben. 289.

ticular district.<sup>1</sup> In some respects the different states of the United States in the maritime law are treated as foreign to each other, and the different judicial districts created by the federal government are considered as distinct and foreign to each other, so that jurisdiction *in rem* by seizure cannot be exercised outside the limits of the district in which the court sits.<sup>2</sup>

Capacity of actual seizure is so necessary to give jurisdiction that it is necessary to the allowance of the arrest that the libel should set forth that the "vessel is now lying and being within the district and jurisdiction of the court."<sup>3</sup> To give jurisdiction *in rem*, the seizure must be valid; such seizure cannot be made of a vessel when in actual custody of the sheriff under process of attachment issued by a state court;<sup>4</sup> nor in the hands of a receiver.<sup>5</sup>

<sup>1</sup> The *Ada*, 2 Ware, 408; The *Pennsylvania*, 9 Blatch. 451, s. c., 4. Ben. 257; *Cheeseman v. Two Ferry Boats*, 2 Bond. 363; *Ex parte Graham*, 4 Wash. 211.

<sup>2</sup> The *L. W. Eaton*, 9 Ben. 289; *Ex parte Devoe Mfg. Co.*, 108 U. S. 401.

<sup>3</sup> The *Bristol*, 4 Ben. 55.

<sup>4</sup> *Taylor v. Carryl*, 20 How. 583; *Miller v. The U. S.*, 11 Wall. at p. 294; The *Oliver Jordan*, 2 Curtis, 414; The *Red Wing*, 14 Fed. Rep. 869; The *Robert Fulton*, 1 Paine, 620.

<sup>5</sup> The *Red Wing*, 14 Fed. Rep. 869.

§ 133. Although libels have been allowed to arrest vessels while passing on a voyage through waters lying within the limits of the district in which its jurisdiction extends, there are circumstances under which a vessel with cargo and passengers on board might be arrested by the court through whose jurisdiction the vessel was passing, which would be attended with the gravest consequences, such as vessels passing through the East River on interstate voyages from southward and eastward; in the Vineyard Sound, and on the Mississippi, the Hudson, and the Delaware rivers. If the vessel is liable to arrest in each of the jurisdictions through which it passes, the consequences might be disastrous to other interests than the vessel concerned.

By the law of France, when the master is ready to sail the ship is not liable to arrest except for debts contracted for the voyage which is about to commence.<sup>1</sup>

Whether vessels which are merely passing through waters within the jurisdiction of the court can be treated as found within the jurisdiction for the purpose of enforcing the proceeding *in rem* in admiralty, would appear to be questionable.<sup>2</sup>

<sup>1</sup> Pardessus, Cours de Droit Commercial, vol. iii. § 610, p. 32.

<sup>2</sup> The Commerce, 1 Black. 574.

In a late case arising in Scotland the right to arrest a vessel which had commenced her voyage, and was sailing from Leith to America, was denied, although the arrest was made in the river Clyde within the jurisdiction of the court of Scotland. The reasons given in the House of Lords by Lord Cairns are as applicable to arrest in proceedings *in rem* as *in personam*. "I can find no authority whatever which would justify them in turning the ship about, and shipping her back into port."<sup>1</sup>

In a subsequent phase of the cause, a second arrest of the ship, after she had been unlawfully brought back, at the suit of other parties who acted in concert with the original arrestors, was also recalled.<sup>2</sup>

<sup>1</sup> *Borjesson v. Carlburg*, L. R. 3 App. Cases, 1316. The vessel was brought into the harbor of Greenock, where she did not intend to touch. Lord Hatherly says: "At all events it is quite clear that what has been done, if allowed to proceed, might lead to the gravest consequences, and so far from being justified by precedent, as I have already said, the only precedent which has been relied upon is one which has a very strong leaning the other way."

<sup>2</sup> *Ibid.* 1322. That the act of passing through waters over which the jurisdiction of a nation or community extends, does not necessarily subject the vessel to the jurisdiction; *ante*, p. 100, note 2; *The Thebes*, 12 Hunt's Mer. Mag. 82; nor create either a criminal or civil jurisdiction over the vessel, nor extend the laws of the

§ 134. The effect of a sale under a decree *in rem* by a court of competent jurisdiction is to pass the title as to all the world, although the owner never appears and is not heard.<sup>1</sup> The rule as to movable property is that whatever the court having jurisdiction over the subject determines as to the right or title, or whatever disposition of the property it makes by sale, transfer, or other act, will be held valid in every other country where the same question comes directly or indirectly before the tribunals, and a judgment acting *in rem*, will be held conclusive, upon the title, transfer, and disposition of the property itself in whatever place the same may be found and by whomsoever it may

country as a part of the *lex loci* over a vessel in transit, not bound to or departing from a port of the jurisdiction, would seem to be clear from general authority both American and foreign. Anchoring in the course of a voyage in a roadstead does not subject a vessel to the law of the locality; *Gann v. The Free Fishers of Whitstable*, 11 H. of L. C. 192.

The point is an important one, and although arrest of vessels in transit has been allowed by District Courts of the United States, it is doubtful whether it can be sustained as a proper exercise of admiralty process, or that it is within the jurisdiction of the court to issue its process to arrest vessels in transit, and not lying and being within the district out of which process issues.

<sup>1</sup> *U. S. v. The Malek Adhel*, 2 How. 210; *Slocum v. Mayberry*, 2 Wh. 1; *Imrie v. Castrique*, 98 E. C. L. R. 405; *Hughes v. Cornelius*, 2 Show. 232.

be questioned.<sup>1</sup> A sale acts as a purgation or discharge of the property from all debts to which it may be subject, the creditor being remitted to the fund produced by the sale.<sup>2</sup> And a sale by a master in a case of necessity discharges all liens; but unlike a proceeding *in rem* by a court having jurisdiction, it can be impeached in other proceedings.<sup>3</sup> The sentences of courts of admiralty in the matter of maritime liens, have always been considered as judgments *in rem*. "The whole world, it is said, are parties in an admiralty cause, and, therefore, the whole world is bound by the decision."<sup>4</sup> Seizure by a court of competent jurisdiction *in rem* is equivalent to notice in proceedings in *personam*,<sup>5</sup> and in one sense it is properly so, for the purpose of the suit. The effect of the judgment is to afford a remedy not by execution against the person or general estate of the

<sup>1</sup> 1 Story on the Conflict of Laws, §§ 592-93; *Cammell v. Sewell*, 3 H. & N. 617.

<sup>2</sup> *The Trenton*, 4 Fed. Rep. 657; 1 Boulay, *Paty Droit Com. & Maritime*, 106.

<sup>3</sup> *The Amelie*, 6 Wall. 18.

<sup>4</sup> Per Marshall, C. J., in *The Mary*, 9 Cranch, 126-144.

<sup>5</sup> *Daily v. Doe*, 3 Fed. Rep. 903; *Peters v. The Warren Ins. Co.*, 3 Sumner, 389; *Magoun v. New Eng. Marine Ins. Co.*, 1 Story, 157; *Thompson v. The Julius D. Morton*, 2 Ohio (N. S.), 26; *The Robert Fulton*, 1 Paine, 620; *Hollingsworth v. Barbour*, 4 Pet. 466.

defendant, but by the appropriation of a specific chattel to satisfy the plaintiff's claim."<sup>1</sup>

§ 135. The judgment *in rem* of a foreign tribunal in its effect of the title to the vessel cannot, if erroneous, be questioned in the courts of the country to which the vessel belongs.<sup>2</sup>

To invalidate such a sale on the ground of fraud it must appear that the proceedings were both collusive and fraudulent, and that the purchaser was cognizant of the fraud.<sup>3</sup> And the fact that the decree might have been opened for want of proper publication under the rules, will not render a sale under such proceedings void;<sup>4</sup> even when the record shows error or irregularity, such decrees cannot be attacked collaterally,<sup>5</sup> but condemnation of a vessel does not necessarily make it a binding decree on the cargo.<sup>6</sup>

In *Imrie v. Castrique*,<sup>7</sup> the Exchequer Chamber

<sup>1</sup> Per Cockburn, C. J., in *Imrie v. Castrique*, 98 E. C. L. R. 405; *Castrique v. Behrens*, 7 Jurist (N. S.), 1028.

<sup>2</sup> *The Trenton*, 4 Fed. Rep. 657.

<sup>3</sup> *The Garland*, 16 Fed. Rep. 283.

<sup>4</sup> *Daily v. Doe*, 3 Fed. Rep. 903.

<sup>5</sup> *Waples' Proceedings in Rem*, 112; *Aurora City v. West*, 7 Wall. 82.

<sup>6</sup> *The Mary*, 9 Cranch, 126.

<sup>7</sup> 98 E. C. L. R. 405, affirmed L. R. 4 H. of L. (English & Irish App.) 414.

held, reversing the Common Pleas, that a sale of an English vessel under the decree of a French tribunal, in a suit *in rem*, on a draft given for necessities supplied to the master of an English vessel at Melbourne, passed the title as against the purchaser before the judicial sale, although it was admitted that by the English law the master could not hypothecate the vessel for such supplies.<sup>1</sup> The supplies were furnished at an English port, and there was no hypothecation by reason of a contract being made in a foreign country where the foreign law would govern.<sup>2</sup> If the supplies had been furnished at a port where a maritime lien was thereby created, it might not have been a case for the application of the English law. The Common Pleas had decided that the action was *in personam* and not *in rem*.<sup>3</sup>

<sup>1</sup> Followed in *Castrique v. Behrens*, 7 Jurist (N. S.), 1028.

<sup>2</sup> *Stainbank v. Fenning*, 11 C. B. (78 E. C. L. R.) 51.

<sup>3</sup> In answer to the argument made, that the sale of the ship, under such circumstances, by the French court was of itself contrary to natural justice, Cockburn, C. J., says: "I cannot concur in this. I cannot say that a rule of the civil law which prevails in Scotland, and generally throughout Europe, and which in substance puts the necessary disbursements of the ship on a voyage upon the same footing as the law of England puts salvage, is of itself necessarily unjust, although the municipal law of England differs from it." See the note by Henry Wharton to *Castrique v. Imrie*, 98 E. C. L. R. p. 44.



In *Cammell v. Sewell*,<sup>1</sup> the master of a Prussian ship wrecked on the coast of Norway, applied for a sale of the cargo owned in England by the authorities of Norway under the law of that country. The English owners of the cargo objected at the sale, and instituted proceedings in the courts of Norway to rescind the sale, in which proceedings the sale was decided to be valid under the law of Norway. In trover brought in England against the purchaser the sale in Norway was held to be valid, and to pass the title to the cargo.<sup>2</sup>

<sup>1</sup> 3 H. & N. 617.

<sup>2</sup> The Exchequer held that it was perfectly clear that there was no necessity to justify the sale; but that the proceedings to set aside the sale were in the nature of proceedings *in rem*, and such a judgment was final and determined the question. The Exchequer Chamber, in 5 H. & N. 728, approved the judgment, but did not agree as to the effect of the proceedings in the courts of Norway being *in rem* or as to the action being a judicial proceeding, holding however that by the law of Norway the title of an innocent purchaser at such a sale would be protected, and that the sale of movables was governed by the law of the *situs*, and that the law of England, under which no title would have passed, never attached to the property. Byles, J., dissented from the judgment in the Exchequer Chamber, holding that the proceedings were not *in rem*, and that there had been no judgment *inter partes*. The sale at auction was in the nature of advisory proceedings, which do not give an indisputable title, or necessarily divest that

The decision, however, was also sustained in the lower court on the ground that the plaintiff, by seeking redress in the courts of Norway, as to the effect of the sale on the cargo, was bound by the adjudication of those courts.<sup>1</sup>

§ 136. The process of attachment in an admiralty proceeding, or at common law, is not necessarily a proceeding *in rem*,<sup>2</sup> although proceedings *in rem* may be commenced by proceedings to attach proceeds or funds in the hands of a garnishee.<sup>3</sup> Yet proceedings for collisions in the courts of Portugal,<sup>4</sup> and process of attachment issued out of the state courts against a vessel in

of the owner; *The Segredo*, 1 Spinks, 86; *The Tilton*, 5 Mason, 465, *post*, § 136. It may be said, also, that a different law would apply in a case of wreck from that in which the goods were voluntarily brought into the country. In such cases it would appear that the master's right to sell would depend upon the authority given by the law of the vessel's nation; *Pope v. Nickerson*, 3 Story, 465; *The Bahia*, Br. & Lush, 292, *ante*, § 38.

<sup>1</sup> *Cammell v. Sewell*, 3 H. & N. at p. 645; *The Scotland*, 105 U. S. 24.

<sup>2</sup> *The New Jersey St. Nav. Co. v. The Merchants' Bank*, 6 How. 344. *Ex parte McNiel*, 13 Wall. 236; *Harmer v. Bell* (*The Bold Buccleugh*), 7 Moore, P. C. C. 267; s. c. 22 Eng. L. & Eq. R. 62.

<sup>3</sup> *Snow v. Tons of Scrap Iron*, 11 Fed. Rep. 517; *Flaherty v. Doane*, 1 Low, 148-151.

<sup>4</sup> *The City of Mecca*, L. R. 6 P. D. 106.

Rhode Island under a statute of that state,<sup>1</sup> and a writ of sequestration of a vessel under a statute of Louisiana for wages,<sup>2</sup> were all held not to be proceedings *in rem*.

An attachment of the ship, and her release on bail under the laws of Scotland in an action of damages for collision,<sup>3</sup> was decided not to be a proceeding *in rem*, so as to prevent a subsequent arrest of the vessel in admiralty for the same cause of action. So also proceedings taken by attachment in New Orleans by the creditors of the owners of a British vessel which had been mortgaged in England to a British subject, were held to be proceedings *in personam* and not *in rem*. The mortgagee's claim to defend against the attachment was rejected by the court of Louisiana on the ground that there could not be a mortgage of movables, and the vessel was sold under the attachment.<sup>4</sup> The English courts decided in a bill brought by the mortgagee after the arrival of the ship in England that as the court in an action *in personam* proceeded on a mistake, or in disregard of the English law, which governed the contract, the mortgagee's

<sup>1</sup> *Steamboat Co. v. Chase*, 16 Wall. 522.

<sup>2</sup> *Leon v. Galceran*, 11 Wall. 185.

<sup>3</sup> *Harmer v. Bell*, 22 Eng. L. & Eq. R. 62.

<sup>4</sup> *Simpson v. Fogo*, 9 Jurist (N. S.), 403.

title was not divested by the sale. The sale, however, was under an execution to satisfy the claim of the creditors, and, as it was not a proceeding *in rem*, the mortgage was not necessarily divested.<sup>1</sup>

But where, in a proceeding in foreign attachment at common law, the vessel, pending the suit, and while in custody, was sold by order of court as perishable, to protect the interest of all concerned, the sale thus made by a competent court having jurisdiction of the subject, discharged all liens, including sailor's wages.<sup>2</sup>

The decision in *Taylor v. Carryl*<sup>3</sup> was upon the ground that where the jurisdiction of the state

<sup>1</sup> See remarks of Blackburn, J., on this case, in *Castrique v. Imrie*, L. R. 4 H. L. Cas. (Eng. & Irish App.) p. 436. The case was complicated by the fact that the mortgagees had appeared in the courts of Louisiana and contested the right to sell under a judgment against the owners; the view of the courts of Louisiana that such a mortgage would be disregarded, did not apparently affect the right to sell if the mortgage was valid. *Leon v. Galceran*, 11 Wall. 185, shows that the writ of sequestration in Louisiana has no analogy to proceedings *in rem*; it was the process at civil law like the attachment at law. See Sir W. Page Wood's remarks in the case of *Simpson v. Fogo*, 9 Jurist (N. S.), 433.

<sup>2</sup> *Taylor v. Carryl*, 20 How. 583; *The Amelie*, 6 Wall. 18; *Post v. Jones*, 19 How. 150; *Stringer v. The Marine Ins. Co.*, L. R. 4 Q. B. 676.

<sup>3</sup> 20 How. 583.

court attached, there could be no proper service of process by the admiralty, but the result necessarily follows from the admission that a court of competent jurisdiction had possession of the *res* against which the admiralty attempted to enforce the maritime lien by process out of the court; as a sale in proceedings *in rem* will discharge liens which the court ordering the sale had no original jurisdiction to enforce.<sup>1</sup>

The test whether a proceeding by way of attachment is *in rem* or *in personam* is not attended with difficulty. It is a question always whether it is a proceeding to enforce a proprietary right or privilege in the vessel and to preserve property, or a proceeding to enforce a personal obligation by seizing the property of the debtor. In the latter case the proceedings, though conclusive as between the parties so far as the property is concerned, are not *in rem* so as to bind the interest of third persons or to pass the title of any but the defendant;<sup>2</sup> while, in proceedings *in rem*, the decree of a court of competent jurisdiction having the *res* legitimately within its control is binding upon all parties.

<sup>1</sup> The Trenton, 4 Fed. Rep. 657; Stringer v. The Marine Ins. Co., L. R. 4 Q. B. 676; The Angelique, 19 How. 239.

<sup>2</sup> Woodruff v. Taylor, 20 Vermont, 65; The City of Mecca, L. R. 6 P. D. 106.

Where in a suit in admiralty, property in the hands of a third person is arrested on a claim to a specific lien upon it, that constitutes the suit a suit *in rem*, and it is not a foreign attachment, whether the third person holds the property in his own right or as trustee of the debtor, and without regard to the form of the process. While a foreign attachment supposes the property proceeded against belongs to the debtor and not to the garnishee, and seeks to make the garnishee the debtor of the libellant to the value of the property in case the primary debtor does not appear in the cause or satisfy the decree.<sup>1</sup>

Sales by decrees of the colonial vice-admiralty courts in ordinary proceedings taken at the instance of the masters of vessels in distress are not proceedings *in rem* which bind the parties, but are treated as valid or otherwise, according as the circumstances make the sale justifiable or otherwise.<sup>2</sup> Such decrees will pass no title to the purchaser unless the circumstances justify the sale; although in the English case before referred to, an order of

<sup>1</sup> Per Betts, J., in *Reed v. Hussey*, 1 Bl. & How. 525.

<sup>2</sup> *Morris v. Robinson*, 3 B. & C. (10 E. C. L. R.) 196; *Cannon v. Meaburn*, 1 Bing. 243; *Reid v. Darby*, 10 East. 143; *The Warrior*, 2 Dodson, 288; *The Fanny & Elmira*, Edwards' Adm. 118; *The Segredo*, 1 Spinks, 36; *The Tilton*, 5 Mason, 465.

sale of cargo on proceedings by a master at a port of distress was treated as having the weight of decisions in proceedings *in rem*.<sup>1</sup>

It is doubtful whether greater effect can be given to such orders of sale than to sales by masters in foreign ports under the advice of surveyors called in by the master which pass the title only under such circumstances as render the sale justifiable.<sup>2</sup> In some districts the District Courts appoint surveyors of damaged cargoes and vessels, whose reports in judicial investigations are treated as those of other experts. A sale under judicial proceedings which are not *in rem*, and to which the owner was not made a party is a nullity, and passes no title to the purchaser.<sup>3</sup> Another court may examine into the proceedings collaterally, and if it finds such proceedings to be *coram non judice* will disregard them.<sup>4</sup>

<sup>1</sup> *Cammell v. Sewell*, 3 H. & N. 617.

<sup>2</sup> *The Amelie*, 6 Wall. 18; *The Sarah Ann*, 13 Pet. 387; *Post v. Jones*, 19 How. 150.

<sup>3</sup> *The J. W. French*, 13 Fed. Rep. 916.

<sup>4</sup> *The Angelique*, 19 How. 239.

## CHAPTER VII.

## THE APPEAL IN ADMIRALTY, INCLUDING PROHIBITION TO THE DISTRICT COURT.

An appeal the only method of review, § 137.	Inferences of fact not considered, except when presumptions of law, § 150.
Suspends and vacates decree, § 138.	Bill of exceptions, § 151.
Proceedings <i>de novo</i> in appellate court, § 138.	Whether decree of Circuit Court vacated by appeal to the Supreme Court, § 152.
Statutes regulating appeals, § 139.	Prohibition to the District Court, § 153.
When it becomes a supersedeas, § 140.	For excess of exercise of jurisdiction, § 154.
Appeals to Circuit Courts, § 141.	Reasons for granting to the admiralty, § 155.
Security on such appeals, § 141.	Principles on which it is exercised, § 156.
Proceedings on appeal, § 142.	Not allowed, if the cause is maritime and the vessel arrested in the district, § 157.
Amendments in Circuit Court, § 143.	Amount necessary to give jurisdiction on appeal to the Supreme Court, §§ 158-162.
Who may appeal, § 144.	
In suits against two vessels, § 145.	
Decree must be final, § 146.	
When appeal is wrongfully taken, § 147.	
From Circuit Court in execution of mandate, § 148.	
The court examines only the facts as reported, § 149.	

§ 137. AN appeal is the only mode of reviewing causes of admiralty and maritime jurisdiction. Regulations respecting writs of error do not apply,<sup>1</sup> even in trials by a jury in causes arising on the lakes.<sup>2</sup>

<sup>1</sup> The San Pedro, 2 Wh. 132.

<sup>2</sup> Boyd v. Clark, 13 Fed. Rep. 908.



An appeal is a process of civil law origin subjecting the facts as well as the law to a review and re-trial.<sup>1</sup> The effect of the appeal in admiralty differs entirely from the writ of error at common law. In a writ of error the appellate court examines into the record as it exists at the time the judgment is entered in the court below, and if the judgment was correct at the time the sentence was rendered, it will be affirmed, although the law has expired or been repealed when the cause comes on to be examined on writ of error.<sup>2</sup>

§ 138. But the effect of the appeal in admiralty is to suspend and vacate the decree which is appealed from, and the decree is not final until it is heard and decided in the appellate court.<sup>3</sup> The appeal in the Supreme Court not only might involve a new state of facts disclosed by additional evidence taken in the Supreme Court on appeal,<sup>4</sup> but a new state of the law.<sup>5</sup>

<sup>1</sup> Ellsworth, C. J., in *Wiscart v. D'Auchy*, 3 Dall. 321.

<sup>2</sup> *Bechtol v. Cobaugh*, 10 S. & R. (Pa.) 121; *Bedford v. Shilling*, 4 S. & R. (Pa.) 401.

<sup>3</sup> *The General Pinckney*, 5 Cranch, 281; *U. S. v. Preston*, 3 Peters, 57; *Wiscart v. D'Auchy*, 3 Dallas, 321; *The Lucille*, 19 Wall. 73; *Ex parte Warden*, 13 W. N. C. (Pa.) 195; *The Morning Star*, 14 Fed. Rep. 866.

<sup>4</sup> *Hemmenway v. Fisher*, 20 How. 255.

<sup>5</sup> *The General Pinckney*, 5 Cranch, 281.

In the *General Pinckney*,<sup>1</sup> the vessel was condemned in the District Court, in July, 1807; the decree was affirmed in the Circuit Court in the succeeding November. The law under which the vessel was condemned had expired by limitation when the appeal was heard in the Supreme Court of the United States. Chief Justice Marshall says, "The majority of the court is clearly of the opinion that in admiralty cases an appeal suspends the sentence altogether. And that it is not *res adjudicata* until the final sentence of the appellate court be pronounced. The cause in the appellate court is to be heard *de novo*, as if no sentence had been passed. This has been the uniform practice, not only in cases of appeal from the District to the Circuit Courts of the United States, but in this court also."

Until the passage of the act of 1875,<sup>2</sup> the Supreme Court on appeal examined both the facts and the law. The appellant had the right to demand the judgment of the court on every question arising in the cause,<sup>3</sup> and the court might enter such a decree as the record showed the libellant entitled to, although the grounds on which the

<sup>1</sup> *Yeaton v. U. S.*, 5 Cranch, 281.

<sup>2</sup> Rev. Stat. Sup. p. 135.

<sup>3</sup> *Post v. Jones*, 19 How. 150.

decree was made were not urged in the lower court, nor appeared on the face of the pleadings.<sup>1</sup>

§ 139. The appeal to the Supreme Court in admiralty was given by the Judiciary Act of 1789,<sup>2</sup> whereby final judgment of any Circuit Court or of any District Court acting as a Circuit Court in civil actions removed there from any Circuit Court by an appeal or writ of error, where the matter of dispute, exclusive of costs, exceeds the sum or value of two thousand dollars (the amount has since been increased to five thousand dollars),<sup>3</sup> may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. By the act of 3 March, 1803,<sup>4</sup> an appeal is allowed instead of a writ of error to such final decrees in cases of equity and of admiralty jurisdiction, and the Supreme Court is required to receive, hear, and determine such appeals.

<sup>1</sup> *Dupont v. Vance*, 19 How. 162. In this case the libel set forth a breach of the contract of affreightment for the non-delivery of the cargo; the final decree in the Supreme Court was for the proportion of general average payable by the vessel on cargo of libellant, which had been jettisoned. See *The Julia Blake*, 107 U. S. 418.

<sup>2</sup> 24 September, 1789, § 22, vol. i. p. 84.

<sup>3</sup> See act of March 1st, 1875, c. 114, § 5; Supplement to Rev. Stat. vol. i. p. 186.

<sup>4</sup> Ch. 40, § 2, vol. ii. page 244.

The Judiciary Act of 1789 speaks of an appeal and a writ of error, but it does not confound the terms, nor use them promiscuously. They are to be understood when used according to their ordinary acceptance.

Under the act of April 29, 1802,<sup>1</sup> followed by acts of June 1, 1872, and February 16, 1875,<sup>2</sup> any final judgment or decree in any civil suit or proceeding before a Circuit Court held by a circuit justice and a circuit judge, or a district judge, or by the circuit judge and a district judge, wherein the judges certify that their opinions are opposed, may be reviewed and affirmed, or reversed or modified by the Supreme Court on a writ of error or appeal, according to the nature of the case. This method of bringing up a question for review was decided to apply to causes in admiralty in the Circuit Court taken by appeal from the District Courts.<sup>3</sup>

§ 140. The time within which such appeals are to be taken, and the bail to be given on appeal, are regulated by statutes which come within the scope of the works on practice. It may be generally stated that the appeal from the Circuit Court to the Supreme Court to be effectual must be taken

<sup>1</sup> 2 Stat. at Large, 1591.

<sup>2</sup> Rev. Stat. §§ 652, 693.

<sup>3</sup> *The Ins. Co. v. Dunham*, 11 Wall. 1.

within two years<sup>1</sup> from the actual entry of a decree,<sup>2</sup> and to become a supersedeas of execution, must be entered within sixty days from the rendering of the decree,<sup>3</sup> and be perfected by giving additional security, by bond conditioned that the appellant will prosecute his appeal with effect,<sup>4</sup> which bond is taken in addition to the stipulation for the release of the property attached, or the stipulation for value,<sup>5</sup> which, however, still remains effective.<sup>6</sup> An order may be made granting a supersedeas, and taking security after the expiration of sixty days, provided the appeal was entered while the court was in session within that time.<sup>7</sup> And no execution can issue within ten days, when a writ of error or an appeal will act as a supersedeas.<sup>8</sup>

The time within which an appeal may be taken

<sup>1</sup> Rev. Stat. U. S. § 1008; see *Rodd v. Heartt*, 17 Wall. 354; *The Mamie*, 5 Fed. Rep. 813.

<sup>2</sup> *Rubber Co. v. Goodyear*, 6 Wall. 153; see *Brockett v. Brockett*, 2 How. 238.

<sup>3</sup> Rev. Stat. § 1007.

<sup>4</sup> Rev. Stat. § 1007.

<sup>5</sup> *The New Orleans*, 17 Blatch. 216; *The Wanata*, 95 U. S. 600. See Supreme Court Rule 29. *Kountze v. Omaha Hotel Co.*, 107 U. S. 378.

<sup>6</sup> *The Lady Pike*, 96 U. S. 461.

<sup>7</sup> *Peugh v. Davis*, 110 U. S. 227; *The S. S. Osborne*, 105 U. S. 447; *Dos Hermanos*, 10 Wheat. 306.

<sup>8</sup> Rev. Stat. § 1007; *Board of Com. v. Gorman*, 19 Wall. 661; *Doyle v. Wisconsin*, 94 U. S. 50.

from decrees of the District Court to the Circuit Court is regulated by statutes, the rules of the Supreme Court,<sup>1</sup> and of the several District Courts.

The statutes provide that whenever the matter in dispute exceeds fifty dollars exclusive of costs, the appeal shall be taken to the next Circuit Court to be held in the district after the decree is rendered.<sup>2</sup> The act of 1872<sup>3</sup> is held not to apply to appeals in admiralty.<sup>4</sup>

Where an appeal cannot be taken, it is said by Story, J., to be a question of doubt whether a bill of review will lie as in equity; but the District Court can rehear the case.<sup>5</sup>

<sup>1</sup> Admiralty Rules 45 & 46.

<sup>2</sup> Rev. Stat. § 631.

<sup>3</sup> Rev. Stat. § 635. "No judgment, decree, or order of a District Court shall be reviewed by a Circuit Court, on writ of error or appeal, unless the writ of error is sued out or the appeal is taken within one year after the entry of such judgment, decree, or order: Provided, That where a party entitled to prosecute a writ of error or to take an appeal is an infant, or *non compos mentis*, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within one year after the entry of the judgment, decree, or order, exclusive of the term of such disability."

<sup>4</sup> *Drake v. The Oriental*, 9 Chic. L. N. 321; see also *The S. S. Osborne*, 105 U. S. 447; *U. S. v. Glamorgan*, 2 Curtis, 236; *The Hollen*, 1 Mason, 431; *The Gloucester Ins. Co. v. Younger*, 2 Curtis, 322; *U. S. v. Specie*, 1 Woods. 14; *U. S. v. Hogsheads of Molasses*, 1 Curtis, 276.

<sup>5</sup> *The New England*, 3 Sumner, 495.

§ 141. It is not declared by statute what shall constitute an appeal from the District Courts or from the Circuit Courts. If granted in open court, and entered at any time during the next succeeding term of the Circuit Court, it is sufficient, although the rules of the District Court regulating appeals may not have been fully complied with;<sup>1</sup> no citation is necessary to the appellee.<sup>2</sup> If the District Court improperly refuses an appeal, it may be allowed by the Circuit Court.<sup>3</sup>

If the appellant fails to prosecute his appeal taken to the next term of the Circuit Court held after the entry of the decree, he will be deemed to have abandoned it, and in such case the cause may be remitted to the District Court, or the appellee may produce the original record in the Circuit Court, and claim an affirmance with costs.<sup>4</sup> No appeal lies from a decree dismissing a cause for want of prosecution.<sup>5</sup>

The revised statutes do not provide for security

<sup>1</sup> The *S. S. Osborne*, 105 U. S. 447.

<sup>2</sup> The *Ellen*, 4 Blatch. 107.

<sup>3</sup> The *Enterprise*, 2 Curtis, 317; see, also, *Thornhill v. The Bank*, 4 Am. L. T. Rep. 245.

<sup>4</sup> The *Josephine*, 1 Abb. Adm. 481; *Montgomery v. The Betsy*, 1 Gallison, 416; *Folger v. The Robert G. Shaw*, 2 Wood & M. 531; *Winslow v. Wilcox*, 4 Morrison's Trans. 397.

<sup>5</sup> The *Merchant*, 4 Blatch. 105.

to be entered by the appellant so as to make the appeal effective as a supersedeas of the decree of the District Court as in the cases of writs of error; such security is usually provided for by the rules of court. Where an appeal is allowed by the court, although security is not given within the time allowed by the rules, such allowance is effective after the appeal, and must be considered as relating back to the time of granting the appeal, and renders the appeal effective.<sup>1</sup> The effect of the order allowing further time for an appeal suspends the rules.<sup>2</sup> The mode of taking the security and the time for perfecting it, are matters of discretion to be regulated by the court granting the appeal, and when its order is complied with, the whole has relation back to the time when the appeal was prayed.<sup>3</sup>

What is the effect of an appeal from the District Court to the Circuit Court, where no security for damages on appeal is given as required by the rules of court, is not decided. An appeal by the defendant or claimant without giving such security, would seem to change the aspect of the case, and render it thereafter a proceeding to ob-

<sup>1</sup> *Dutcher v. Woodhull*, 7 Ben. 313.

<sup>2</sup> *The S. S. Osborne*, 105 U. S. 447.

<sup>3</sup> *Dos Hermanos*, 10 Wh. 306.



tain restitution.<sup>1</sup> But the appeal is irregular, and will be dismissed unless security is given for costs when required by the rules of the Circuit or District Court.<sup>2</sup>

§ 142. It is stated by Story, J.,<sup>3</sup> that an appeal from a decree of the District Court must be taken in open court before the adjournment *sine die*, unless a different rule prevails. From the commencement to the end of a term there is in contemplation of law but one sitting, although there may be adjournments or recesses.<sup>4</sup> The admiralty rules of the Supreme Court provide that in case no such rule exists, or no order is made in the particular cause, the appeal must be taken within thirty days from the rendering of the decree.<sup>5</sup> The effect of an order of the District Court, made in a particular cause, suspends the operation of the rules of that court regulating appeals in that cause.<sup>6</sup>

On the hearing of the appeal in the Circuit Court the proceedings are *de novo*.<sup>7</sup>

<sup>1</sup> Per Benedict, D. J., in *Dutcher v. Woodhull*, *ante*.

<sup>2</sup> *Hayford v. Griffith*, 3 Blatch. 34.

<sup>3</sup> *Norton v. Rich*, 3 Mason, 443.

<sup>4</sup> *The Canary No. 2*, 22 Fed. Rep. 536.

<sup>5</sup> Admiralty Rule 45.      <sup>6</sup> *The S. S. Osborne*, 105 U. S. 447.

<sup>7</sup> *The Morning Star*, 14 Fed. Rep. 866. In *The Hesper*, 18 Fed. Rep. 696, salvage awards were reduced in amount, although the respondent did not appeal, following *The Saratoga v. Bales of Cotton*, 1 Woods, 75.

The Circuit Court does not merely affirm or reverse the decree appealed from, but enters its own decree. A decree of the Circuit Court, affirming that of the District Court to which an appeal is taken, is a nullity, and no appeal will lie from such a decree.<sup>1</sup> It cannot affirm the decree of the District Court, and dismiss the appeal.<sup>2</sup> And in accordance with this principle the Circuit Court does not allow interest on the decree as rendered in the District Court, but damages are ascertained as of the time of the loss, and simple interest allowed from that date, without costs, until the time of the decree in the Circuit Court.<sup>3</sup> A different ruling has been made in the Circuit Court of Massachusetts.<sup>4</sup>

The appeal not only vacates the decree, but it takes up the *res* or fund, so that no order can be made in the District Court after the cause is removed to the Circuit Court.<sup>5</sup>

<sup>1</sup> *The Lucille*, 19 Wall. 73; see, also, *The General Pinckney*, 5 Cr. 281; *U. S. v. Preston*, 3 Peters, 57; *Wiscart v. D'Auchy*, 3 Dallas, 321; *Deems v. The Albany and Canal Line*, 14 Blatch. 474.

<sup>2</sup> *The Lottawana*, 20 Wall. 201.

<sup>3</sup> *Deems v. The Albany and Canal Line*, 14 Blatch. 474.

<sup>4</sup> *The Blenheim*, 18 Fed. Rep. 47; see *Hemmenway v. Fisher*, 20 How. 255, in which the Supreme Court holds that the allowance of interest is discretionary in admiralty appeals, and it was refused in affirmance of a decree of the Circuit Court by a divided court.

<sup>5</sup> *The Collector*, 6 Wh. 194; *The Lucille*, 19 Wall. 73; *The*

Funds paid into the District Court are transferred with the record to the Circuit Court.<sup>1</sup> But, as the Supreme Court does not execute its own decrees on appeal, but sends its mandate to the Circuit Court, the property, funds, and other securities given by the parties to abide the final decree, remain in the Circuit Court after an appeal perfected in the Supreme Court.<sup>2</sup>

§ 143. The Circuit Court may on appeal allow new allegations and new proofs to be made, and in doing so is not assuming original jurisdiction of an admiralty cause.<sup>3</sup> Such amendments may be allowed even in matters of substance.<sup>4</sup> And the Supreme Court may in a proper case remand the cause to the Circuit Courts, to allow new allegations to be filed where merits plainly appear, but the case is defective on the pleadings.<sup>5</sup> And such

*Morning Star*, 14 Fed. Rep. 866; *Montgomery v. Anderson*, 21 How. 386; *The Wanata*, 95 U. S. 600; *The Lady Pike*, 96 U. S. 461; *The Grotius*, 1 Gall. 503.

<sup>1</sup> *Hayford v. Griffith*, 3 Blatch. 34; *The Lottawana*, 21 Wall. 558.

<sup>2</sup> Rev. Stat. § 701; *Hayford v. Griffith*, 3 Blatch. 34.

<sup>3</sup> *The Marianna Flora*, 11 Wh. at p. 38; *The Morning Star*, 14 Fed. Rep. 866; *Warren v. Moody*, 9 Fed. Rep. 673; *The Edward*, 1 Wh. 261.

<sup>4</sup> *Warren v. Moody*, 9 Fed. Rep. 673; *The Reuben Doud*, 9 Biss. 458; *The Edwin Post*, 6 Fed. Rep. 206.

<sup>5</sup> *The Adeline*, 9 Cranch, 244; *The Mary Ann*, 8 Wheat. 380.

amendments, if they do not increase the liability of the sureties on the bond for the release of the vessel, will not discharge the sureties who entered into the stipulation for the release of the vessel.<sup>1</sup>

Although the trial in the Circuit Court is *de novo*, yet in some respects it is a rehearing of the same cause, as the evidence produced in the District Court must be considered at the trial on the appeal, as it is required by statute,<sup>2</sup> that the oral testimony of the witnesses taken on the trial in the District Court shall be reduced to writing, and read in the Circuit Court on appeal; while the witnesses must be produced at the trial in the District Court, or their absence accounted for before their depositions can be read.<sup>3</sup> And if the evidence is doubtful or conflicting as to facts, the decree of the District Court will not be disturbed, as the District Court possesses the advantage of having the witnesses before them.<sup>4</sup> Where new evidence

<sup>1</sup> *Newell v. Norton*, 3 Wall. 257.

<sup>2</sup> Act of Sept. 24, 1789, § 30; Rev. Stat. §§ 861-6; Admiralty Rule 50.

<sup>3</sup> *Rutherford v. Geddes*, 4 Wall. 220; *The Hypodame*, 6 Wall. 216; *Taylor v. Harwood*, Taney Dec. 437; *Cushman v. Ryan*, 1 Story, 91; *Bearse v. Pigs of Copper*, *ibid.* 314.

<sup>4</sup> *Davidson v. Sealskins*, 2 Paine, 324; *The Sampson*, 4 Blatch. 28; *The Sunswick*, 5 Blatch. 280; *The Grafton*, 1 Blatch. 173;

is introduced, and the decree is in fact in reversal of that of the District Court, no costs will be allowed, when the decree in the Circuit Court is the result of new evidence produced on the trial in that court, which might have been produced in the lower court.<sup>1</sup> An exception exists where the decree below was produced by connivance of the parties in the court below,<sup>2</sup> and it is said that new evidence introduced on appeal will be looked upon with suspicion if it could have been produced on the first trial.<sup>3</sup>

The Revised Statutes provide that a Circuit Court may affirm, modify, or reverse any judgment, decree, or order of the District Court brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the District Court as the justice of the case may require.<sup>4</sup> This statute, however, while it authorizes the Circuit Court, on reversal of that of the District Court in the entry

*The Narragansett*, *ibid.* 211; *The Florida*, 4 Blatch. 470; *The Golden Gate*, 1 McAl. 104.

<sup>1</sup> *Carrigan v. The Charles Pitman*, 1 Wall. Jr. 307; *The Margaret v. The Conestoga*, 2 Wall. Jr. 116.

<sup>2</sup> *Gonzales v. Minor*, 2 Wall. Jr. 348.

<sup>3</sup> *Cushman v. Ryan*, 1 Story, 91.

<sup>4</sup> R. S. § 636, is decided to apply to admiralty proceedings, *The Benefactor*, 103 U. S. 239.

of its own decree, to remand the cause to the District Court to carry the new decree into effect when such action is necessary,<sup>1</sup> does not alter the nature of an appeal in admiralty. A cause might be so remanded independently of the statute.<sup>2</sup> The Circuit Court, as a rule, executes its own decrees on appeal, and does not send the cause back to the District Court to be carried into effect.<sup>3</sup>

§ 144. An appeal lies by both parties where each is dissatisfied with the decree; but although on appeal the whole record is before the court, the decree against a party who does not appeal, will not be set aside in the Supreme Court.<sup>4</sup>

Where the appeal is taken by the claimant from a decree for full damages against his vessel, as solely in fault, and the court on appeal decides that both vessels are in fault, the court not only reverses so much of the decree as awards full damages against the appellant, but it apportions the damages, and charges the libellant in apportionment with one-half damages sustained by the ap-

<sup>1</sup> *The Benefactor*, 103 U. S. 239.

<sup>2</sup> *The Henry Ewbank*, 1 Sumner, 400.

<sup>3</sup> *The Wanata*, 95 U. S. 600; *Montgomery v. Anderson*, 21 How. 386; *The Collector*, 6 Wh. 194.

<sup>4</sup> *The Dove*, 91 U. S. 381; *The Stephen Morgan*, 94 U. S. 599.

pellant's vessel, provided such damages are alleged in the answer.<sup>1</sup>

In salvage causes an appeal by any of the parties brings up the whole question, and may incidentally affect parties who have not appealed.<sup>2</sup> And in an appeal taken by salvors alone on account of the insufficiency of the award, the amount was reduced.<sup>3</sup> But on appeal by the owners of goods from a decree awarding salvage the amount will not be increased in favor of salvors who have not appealed.<sup>4</sup>

The party not appealing may be heard in support of the decree, but not in opposition to it. In a cause where the damages are divided, and the libellant only appeals, the respondent will be heard to support the proposition that the libellant's vessel is in fault, but will not be heard in support of want of culpability on the part of his own vessel.<sup>5</sup>

<sup>1</sup> *The Sapphire*, 18 Wall. 51; but see *Ward v. Chamberlain*, 2 Black, 430. Whether such damages can be claimed on proceedings in execution of the mandate see *The Sapphire*, *supra*.

<sup>2</sup> *The Henry Ewbank*, 1 Sumner, 400.

<sup>3</sup> *The Hesper*, 18 Fed. Rep. 696; *The Saratoga v. Bales of Cotton*, 1 Woods, 75.

<sup>4</sup> *Stratton v. Jarvis*, 8 Peters, 4.

<sup>5</sup> *The Stephen Morgan*, 94 U. S. 599; *The Quickstep*, 9 Wall. 665; *The Chittenden v. Brewster*, 2 Wall. 191; *The William Bagaley*, 5 Wall. 377; *Harrison v. Nixon*, 9 Pet. 483; *Canter v. The Ins. Co.*, 3 Pet. 307.

The failure of the libellant in a cross libel to appeal from a decree dismissing his claim for damages does not estop him as respondent in the original suit from setting up in an appeal taken from the decree against him as respondent any defence set forth in his answer in the original suit.<sup>1</sup> The decree dismissing the cross-libel prevents him from recovering affirmative damages, but does not prevent him from showing, as defendant in the original suit, that the collision was the result of inevitable accident, or of mutual fault, or that it was caused solely by the fault of those in charge of libellant's vessel.<sup>2</sup>

In the cases of *Chamberlain v. Ward*,<sup>3</sup> and *Ward v. Chamberlain*,<sup>4</sup> no cross-libel was filed, but by agreement of the parties an answer claiming affirmative damages was treated as a cross-libel by respondent, and the whole cause was adjudicated under that agreement; but the practice is disapproved of, and a cross-libel is suggested as the proper form where affirmative damages are claimed. This objection seems only to apply where on final

<sup>1</sup> *The Dove*, 91 U. S. 381.

<sup>2</sup> *The Dove*, 91 U. S. 381; *The Sapphire*, 18 Wall. 51; *The Navarro*, Olcott, 127; *The North American*, Lush. 79; *Snow v. Carruth*, 1 Sprague, 324; *Nichols v. Tremlett*, 1 Sprague, 361; see, also, *The S. S. Osborne*, 105 U. S. 447.

<sup>3</sup> 21 How. 548.

<sup>4</sup> *Ibid.* 572.



apportionment a decree for money is claimed in favor of the respondent ; where it is only in reduction of libellant's claim by recoupment of the respondent's damages, the objection would not apply. It is the most simple form of raising the question of apportionment, and prevents the inconsistency which might arise if a failure to appeal from a decree dismissing a cross-libel should prevent the appellant from having the benefit of the decree so far as it was in his favor.<sup>1</sup>

§ 145. It appears that where a decree is rendered in a suit against two vessels, apportioning the damages between them, an appeal perfected by one of the vessels is a stay of proceedings on the decree against the other vessel, the owner of which has not appealed.<sup>2</sup> This effect must arise from the consideration that the result of the appeal may throw the whole loss upon the vessel which has not appealed. But in a court proceeding as a court of equity the claimant might be called upon to make good his stipulation for the amount with which his liability is fixed, retaining the right to recover for the other moiety of the damages in case the appellant succeeds and the libellant cannot recover from the appellant.

<sup>1</sup> *The Dove*, 91 U. S. 381.

<sup>2</sup> *Ex parte Perry*, 102 U. S. 183.

In a suit for a collision against two vessels, a tug and her tow, alleging injury to a third vessel, the District Court adjudged both the vessels defendants to be in fault. The owners of the tow had before the decree entered into a written stipulation that they would assume the entire conduct of the defence, and would pay whatever sum the libellants should recover against both vessels; the owners of the tow alone took an appeal to the Circuit Court from the whole decree, in which court the same decree was entered, and both vessels adjudged to be in fault, it was considered that as the party who represented the entire interest had appealed to the Circuit Court, both parties might be allowed to appeal from the decree of the Circuit Court to the Supreme Court, although one only had appealed to the Circuit Court.<sup>1</sup>

§ 146. The decrees from which an appeal lies must be final.<sup>2</sup> A cause cannot be transferred from

<sup>1</sup> *The Mabey & Cooper*, 14 Wall. 204. The decision, however, still leaves the regularity of the proceedings doubtful. See *Stratton v. Jarvis*, 8 Pet. 4, where no appeal was taken by the libellant from the decree of the District Court, it was said that he could not be heard in the appellate court to contest that decree.

<sup>2</sup> *The Palmyra*, 10 Wheat. 502; *Mordecai v. Lindsay*, 19 How. 199; *Davis v. The Seneca*, Gilpin, 84; *The New England*, 3 Sumner, 495.

the Circuit Court to the Supreme Court before final determination even by the express permission of an act of congress, as the Supreme Court can only exercise an appellate jurisdiction,<sup>1</sup> and a decree of the Circuit Court affirming a decree of the District Court is not a final determination as it is a nullity. The Circuit Court must pronounce its own decree in the cause.<sup>2</sup>

A refusal to quash an execution is not such a final decree as will authorize an appeal.<sup>3</sup> A garnishee can only appeal from a final decree awarding execution against him,<sup>4</sup> and the only remedy of stipulators is by appeal.<sup>5</sup> And where a cause was heard and decided in the Circuit Court on an appeal taken from a decree of the District Court which was not a final decree, the decree of the Circuit Court was reversed and the cause was remanded, with directions to dismiss the appeal for want of jurisdiction, so as to allow the District Court to make a final decree in the cause.<sup>6</sup> As no

<sup>1</sup> *The Alicia*, 7 Wall. 571.

<sup>2</sup> *The Lucille*, 19 Wall. 73.

<sup>3</sup> *Frain v. The Hiram Wood*, 6 Chic. L. N. 135; *The Elmira*, 16 Fed. Rep. 183; *The Hollen*, 1 Mason, 431.

<sup>4</sup> *Cushing v. Laird*, 107 U. S. 69.

<sup>5</sup> *Ex parte Warden*, 18 W. N. C. (Pa.) 195; *ex parte Sawyer*, 21 Wall. 285.

<sup>6</sup> *Mordecai v. Lindsay*, 19 How. 199.

consent will give jurisdiction,<sup>1</sup> the court refuses to allow any amendment by agreement of the parties in the appellate court so as to make a decree appealed from a final one.<sup>2</sup>

A decree in favor of libellant where there is a reference to a commissioner to ascertain the charges is not a final decree to which an appeal will lie,<sup>3</sup> and a decree in favor of libellant for an ascertained amount payable out of a fund arising from the sale of a vessel, but the amount payable in the decree, depended upon the ascertainment of other claims upon the same fund not yet adjudicated, is not such a final decree; and no appeal will lie until all the claims on the money in the registry had been adjudicated and a final decree of distribution has been entered adjusting the respective priorities and rights of the parties entitled.<sup>4</sup>

If no appeal is taken from the decree of condemnation the subsequent proceedings on the bond given for the appraised value of the vessel,

<sup>1</sup> *Merrill v. Petty*, 16 Wall. 338; *The Merchant*, 4 Blatch. 105.

<sup>2</sup> *Mordecai v. Lindsay*, 19 How. 199; *Ballance v. Forsyth*, 21 How. 389; *Montgomery v. Anderson*, *ibid.* 386.

<sup>3</sup> *Mordecai v. Lindsay*, 19 How. 199; *The Yuba*, 4 Blatch. 314; *The New England*, 3 Sumner, 495.

<sup>4</sup> *Montgomery v. Anderson*, 21 How. 386.

and the issuing of execution thereon are not the subject of appeal.<sup>1</sup>

§ 147. Cases wrongfully brought up, as a rule, are dismissed by the appellate tribunal, but a necessary exception exists where the effect of a decree of dismissal will be to give full effect to an irregular or erroneous decree of the subordinate court, as in a case where the decree is entered without jurisdiction and in violation of legal or constitutional rights.<sup>2</sup>

In such cases the Supreme Court reverses the decrees of the Circuit Court with direction to dismiss the appeal from the District Court for want of jurisdiction.<sup>3</sup>

§ 148. An appeal lies from the proceedings of the Circuit Court in the execution of the mandate from the Supreme Court;<sup>4</sup> upon such an appeal

<sup>1</sup> *The Hollen*, 1 Mason, 431.

<sup>2</sup> *Stickney v. Wilt*, 23 Wall. 150, citing *Barnes v. Williams*, 11 Wh. 415; *Suydam v. Williamson*, 20 How. 427; *Carrington v. Pratt*, 18 How. 63; *Prentice v. Zane*, 8 How. at p. 484; in *The Lucille*, 19 Wall. 73, the appeal was dismissed.

<sup>3</sup> *Mordecai v. Lindsay*, 19 How. 199; *Montgomery v. Anderson*, 21 How. 386. In *Ballance v. Forsyth*, 21 How. 389, the court allowed the appellant to withdraw the transcript and use it upon the appeal in the Supreme Court after an appeal from the District Court had been duly perfected.

<sup>4</sup> *The Gran Para*, 10 Wheat. 497.

nothing is before the court but the proceedings subsequent to the mandate;<sup>1</sup> but where the property has been delivered upon a stipulation for its appraised value, if the court in carrying into effect a decree for restitution, does not allow the proper deduction, its failure to do so may be carried into effect by an appeal from the proceedings of the court on the mandate.<sup>2</sup>

§ 149. The Act of February 16, 1875,<sup>3</sup> has materially altered the proceedings in the Supreme Court on appeal in admiralty causes.

The Circuit Courts are required to find the facts, and conclusions of law separately. "The review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, shall be limited to a determination of the questions of law arising upon the record and to such rulings of the Circuit Court excepted to at the time, as may be presented on a bill of exceptions, prepared as in actions at law," and no decrees shall be re-examined in the Supreme Court unless the matter in dispute shall exceed the sum or value of five thousand dollars, exclusive of costs. Where the amount involved is insufficient to justify an appeal,

<sup>1</sup> *Himely v. Rose*, 5 Cranch. 313; *The Lady Pike*, 96 U. S. 461; *The Sapphire*, 18 Wall. 51.

<sup>2</sup> *Himely v. Rose*, *supra*.

<sup>3</sup> Rev. Stat. § 135.

this act does not apply to the decree in the Circuit Court.<sup>1</sup> In an early case which arose under this statute,<sup>2</sup> the court had entered a decision in favor of libellants for a certain sum without finding the facts or conclusions of law, the court remanded the record to the Circuit Court to state the facts and conclusions of law. This was, however, subsequently explained to be an exceptional proceeding.<sup>3</sup>

The court now adjudicates upon the facts as found, and supports or reverses the decree of the Circuit Court according as the findings of fact certified to the Supreme Court justify or otherwise the decree to which the appeal is taken, and the facts are not re-examined,<sup>4</sup> but are treated as the verdict of a jury in an action at law.<sup>5</sup>

The only question which will be considered on appeal is whether the facts found support the conclusions of law,<sup>6</sup> and whatever is not so found will be considered as not existing as an element to

<sup>1</sup> 1265 *Vitrified Pipes*, 14 Blatch. 274.

<sup>2</sup> Referred to in *The Abbotsford*, 98 U. S. 440.

<sup>3</sup> *The S. S. Osborne*, 104 U. S. 183.

<sup>4</sup> *The Abbotsford*, 98 U. S. 440.

<sup>5</sup> *The Benefactor*, 102 U. S. 214; *The Clara*, 102 U. S. 200; *The Adriatic*, 103 U. S. 730; *The Annie Lindsley*, 104 U. S. 185; *The Francis Wright*, 105 U. S. 381; *The Adriatic*, 107 U. S. 512.

<sup>6</sup> *The Annie Lindsley*, 104 U. S. 185.

support the decree as in the case of special verdicts.<sup>1</sup>

The questions of fact must show the result of the evidence only, and if what is found is, in legal intendment, a presumption of law of the existence of other facts which are not directly found, such facts will be considered as proven, as in the case where the facts found amounted to a direct finding that the claimant's money which he sought to recover in the court of claims had been paid into the treasury of the United States.<sup>2</sup>

§ 150. But such facts as are stated in the conclusions of law will not be considered as a finding of fact so as to support a decree unless they arise as a presumption of law from the finding of other facts.

In an action on a policy of insurance;<sup>3</sup> a finding in the conclusions of law that "the Sun Company's policy covers the Rotterdam charter" was not considered as a finding to that effect, where it was not a necessary inference from the facts found and the decree of the Circuit Court was reversed and the libel dismissed. Such inferences must amount to the class of indisputable presumptions

<sup>1</sup> *Collins v. Riley*, 104 U. S. 322.

<sup>2</sup> *U. S. v. Pugh*, 99 U. S. 265.

<sup>3</sup> *The Sun Mutual Ins. Co. v. The Ocean Ins. Co.*, 107 U. S. 485.



called presumptions of law as opposed to those which are only inferential, or evidence of other circumstances, termed inferences of fact, which, however strong or obvious, may be disregarded.<sup>1</sup>

Whether this rule will apply to the admissions in the pleadings, so as to consider such admissions as facts in the cause in connection with the findings of the Circuit Court, is not decided; although such admissions are stated as coming within the consideration of the Supreme Court on appeal. "Our jurisdiction, in cases of this description, extending to a determination of the questions of law arising upon the record, may be predicated of facts which appear in any part of it, whether admitted by the parties in the pleadings, or by stipulation, or found by the court."<sup>2</sup> Such admissions, however, must be confined to those which are essential to the maintenance of the action or the defence, and cannot apply to other circumstances alleged, which may have been disproved and supplied by other facts in the course of the trial.

§ 151. The office of the bill of exceptions re-

<sup>1</sup> Best's Law of Evidence, § 314, 4th Eng. ed. See also *The Adriatic*, 107 U. S. 512

<sup>2</sup> Per Matthews, J., in *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485.

ferred to in the Act of 1875,<sup>1</sup> is confined to points ruled on the trial of the cause which do not appear on the record as in a trial at law. It cannot be used to draw the whole matter into examination again on appeal.<sup>2</sup>

Where facts material to the cause are conclusively proven by uncontradicted evidence, or if facts are found which there was no evidence to support, it may be permissible to show the same by incorporating a part or the whole of the evidence in a bill of exceptions.<sup>3</sup> Such a modification is necessary to prevent a failure of justice in leaving the whole result of evidence or of its absence to the sole discretion of the judge who tries the cause. This right appears to be conceded in *The S. S. Osborne*,<sup>4</sup> and *The Francis Wright*,<sup>5</sup> but what the remedy would be if the facts presented are material, and the court refuses to pass upon them is not pointed out. The course referred to in *The Abbotsford*<sup>6</sup> is stated to have been exceptional, but the only course consistent with the rights of both parties, appears to be to

<sup>1</sup> Supplement to the Rev. Stat., p. 135.

<sup>2</sup> *The S. C. Tryon*, 105 U. S. 267; *The Francis Wright*, *ibid.* 381; *The S. S. Osborne*, 104 U. S. 183; *The Adriatic*, 103 U. S. 780.

<sup>3</sup> *The Francis Wright*, 105 U. S. at 390.

<sup>4</sup> 104 U. S. 183.

<sup>5</sup> 105 U. S. 381.

<sup>6</sup> 98 U. S. 440.

send a mandate to the Circuit Court requiring that court to pass upon a material question to which its attention had been properly called, and which it had refused to affirm or deny. Where a fact is necessary to create liability, and does not appear in the findings of fact it is treated as not proven.<sup>1</sup>

In actions of negligence the question is a mixed one of fact and of law; negligence may be found as a fact, and leave no conclusion of law to be examined, important questions of law may by the form of the findings be precluded from re-examination in the same manner that a question of fact found and misplaced in the conclusions of law is excluded from the consideration of the appellate court, as in *The Sun Mut. Ins. Co. v. The Ocean Ins. Co.*<sup>2</sup>

The Supreme Court by a rule promulgated in *The Adriatic*<sup>3</sup> refuses to allow any part of the evidence to be sent up with the record. There does not appear to be any method to obtain redress where the court refuses to pass upon a material fact except by the presentation of the question in the trial, and in case of a failure to pass upon the

<sup>1</sup> *The Sun Mut. Ins. Co. v. The Ocean Ins. Co.*, 107 U. S. 485.

<sup>2</sup> 107 U. S. 465.

<sup>3</sup> 103 U. S. 730. Supreme Court Rule VIII. (6).

same either affirmatively or negatively to tender a bill of exceptions containing the evidence.

§ 152. Whether the effect of the admiralty appeal in the Supreme Court<sup>1</sup> in vacating the decree of the court below is altered by the act of 1875, is a question of doubt. Although the case is not heard *de novo*, as to the facts involved, the effect of the appeal is not so necessarily changed<sup>2</sup> that the expiration of a statute under which a condemnation has taken place will not affect the decree, when rendered in the Supreme Court. The intention of the legislature does not appear to produce any other change, except in the examination of the facts; and taking the facts to be the same as found in the court below, the law will probably be applied in such cases as it exists at the time of the hearing in the Supreme Court on appeal.<sup>3</sup>

The importance of this in questions of forfeitures and penalties prosecuted in admiralty, would seem to have required an authoritative declaration of the legislature, if any other effect was intended than to confine the appeal to questions of law.

§ 153. In addition to an appeal to the Circuit Court, the remedy by writ of prohibition was given

<sup>1</sup> *The Lucille*, 19 Wall. 73.

<sup>2</sup> *The Benefactor*, 103 U. S. 239.

<sup>3</sup> *The General Pinkney* (*Yeaton v. U. S.*), 5 Cranch, 281; *U. S. v. Preston*, 3 Peters, 57.

by the Judiciary Act, 24th Sept. 1789. The writ issues from the Supreme Court of the United States to the District Courts, "when proceeding as courts of admiralty and maritime jurisdiction."<sup>1</sup> This revising power is confined exclusively to causes in which the court is proceeding as a court of admiralty.<sup>2</sup>

The court is not authorized to issue a writ of prohibition to the District Court in any other cause, so that it cannot issue to the District Court when sitting in bankruptcy,<sup>3</sup> and proceedings *in rem* to confiscate real estate under the act of July 17, 1862,<sup>4</sup> which declares that such proceedings shall be *in rem*, and "shall conform as nearly as may be to proceedings in admiralty, or in revenue cases" are not proceedings in admiralty, within the meaning of the judiciary act.<sup>5</sup>

It issues, therefore, only when the District Courts as courts of admiralty are assuming cognizance of matters over which they have no admiralty jurisdiction.<sup>6</sup>

<sup>1</sup> R. S. § 688.

<sup>2</sup> *Ex parte Christy*, 3 How. 292; *Ex parte Gordon*, 1 Black, 503; *Ex parte Warmouth*, 17 Wall. 64.

<sup>3</sup> *Ex parte Christy*, 3 How. 292.

<sup>4</sup> § 7 U. S. Stat. at Large, vol. 12, p. 591.

<sup>5</sup> *Ex parte Graham*, 10 Wall. 541.

<sup>6</sup> *U. S. v. Peters*, 3 Dall. 121; *Ex parte Easton*, 95 U. S. 68.

Whether the District Court has exceeded its jurisdiction, it is said, depends upon the facts appearing on the record of the cause in the District Court; and the court will not, upon an application for the writ, look beyond the record.<sup>1</sup> It will lie after sentence; and although part of the cause of action is within the jurisdiction of a tribunal, it will not be permitted to make a jurisdiction for itself by coupling matters beyond its control with those which it may rightfully adjudicate.<sup>2</sup>

§ 154. The writ of prohibition is defined as an extraordinary judicial writ issuing out of a court of superior jurisdiction, and directed to an inferior court for the purpose of preventing the inferior court from assuming a jurisdiction with which it is not legally vested.<sup>3</sup> It is not a writ of right granted *ex debito justitiæ*, but rather one of sound judicial discretion to be granted or withheld, according to the circumstances of each particular

<sup>1</sup> Per Clifford, J., in *Ex parte Easton*, 95 U. S. 68. See, however, High's Ex. Legal Remedies, § 774, p. 560, note 2, from which it appears that before sentence you may have a prohibition upon suggestion of a matter of fact not appearing on the face of the proceedings below; but after sentence you cannot overturn the proceedings by a bare averment of a fact.

<sup>2</sup> *Evans v. Gwyn*, 5 Ad. & El. (N. S.), 844.

<sup>3</sup> High's Extraordinary Legal Remedies, 550.

case.<sup>1</sup> It lies only to matters of a judicial nature, and will not go to prevent the exercise of ministerial acts.<sup>2</sup> It can be used only to prevent the doing of some act which is about to be done, and not as a remedy for acts already completed.<sup>3</sup> Therefore, where a rule has been granted in the Supreme Court on the judge of a District Court to show cause why a writ of prohibition should not be issued, accompanied by an order that he should proceed no further in the case, until the decision of the court in the premises, and the return of the judge set forth that, after service of the rule on him, an order had been made allowing the libellant to pay all costs, and dismiss the suit, the rule was discharged, as there was nothing left to be done.<sup>4</sup>

§ 155. The jealousy entertained by the English people of a court exercising a jurisdiction capable of being arbitrarily exercised, and without the common law methods of trial by jury, extended to the colonies, and found expression in petitions set-

<sup>1</sup> Ibid. p. 551.

<sup>2</sup> *Ex parte Brandlacht*, 2 Hill, 367 ; *State v. Clark Co. Court*, 41 Mo. 44.

<sup>3</sup> Coke, 2d Institute, 602.

<sup>4</sup> *U. S. v. Hoffman*, 4 Wall. 158. It will not lie against the sentence of a court-martial which has ceased to exist, and the sentence of which had been carried into effect. *In re Poe*, 5 Barn. & Ald. 681.

ting out among other grievances the establishment of vice-admiralty courts dealing with questions of revenue. This jealousy was not without reason at the time it existed. Coke's objection to the extension of the admiralty jurisdiction, was well founded, at least in one respect, that the admiralty as then constituted was not a court of record; in respect that no appeal lay from its decisions to the ordinary judicial tribunals, but to the delegates, who were not necessarily lawyers.<sup>1</sup>

On the adoption of the constitution, however, congress gave to the admiralty courts of the United States the same jurisdiction in revenue causes as was exercised by the vice-admiralty courts in colonial times. It accompanied the grant of jurisdiction by a right of appeal to the Circuit Court, and created also a direct supervisory power in the Supreme Court over the District Courts which initiated proceedings, by the writ of prohi-

<sup>1</sup> "The court of the admiralty proceeding by the civil law is no court of record, and therefore cannot take any such recognizance as a court of record may do. And for taking of recognizance against the laws of the realm we find that prohibitions have been granted as by law they ought. And if an erroneous sentence be given in that court, no writ of error but an appeal before certain delegates do lie, as it appeareth by the statute of 8 Eliz. Reginæ, cap. 5, which proveth that it is no court of record." 4 Coke's Inst. chap. 22, p. 135.



bition directed to be issued directly from the Supreme Court to the District Courts in admiralty to prevent them at the outset from taking any step in the way of jurisdiction which was not authorized by law; no such writ was allowed to the Circuit Courts. The legislative plan appears to have been to stop *in limine* any attempt to exercise powers not warranted by law and save suitors the expense and delays attendant on appeal to the Supreme Court from the Circuit Court. The necessity of such a restraint lay chiefly in the character of its peculiar admiralty process of attachment by process *in rem*, by which the vessel or property could be arrested on the allowance of process by a judge without any security being taken to indemnify the owner of the property attached, and the arrest is notice to every interest.<sup>1</sup>

<sup>1</sup> The *Mary*, 9 Cranch, 126. While the issuing of an attachment in other proceedings subjects the attaching creditors to an action for the detention of the property if the claim is attempted to be unlawfully enforced and is generally accompanied by a bond to indemnify the owner of the property if improperly seized, the allocatur of the judge in admiralty is an act of the law, so that no damages are allowed for the arrest and detention of a vessel except in causes of possession. The *Adolph*, 5 Fed. Rep. 114; The *Evangelismos*, Swabey, 378; s. c., 12 Moore's P. C. C. 358; The *D. H. Peri*, Lush. 548; The *Strathnaver*, L. R. 1 App. Cases, 58; The *Active*, 5 Law Times (N. S.) 773; The *Amelia*,

Prohibition is granted on the application of a party to the record, and it may be granted on the application of a stranger, as the action of the court in assuming a jurisdiction which it is not entitled to exercise is treated as a public wrong. The same degree of interest is not required in the application for the writ as in the case of mandamus.<sup>1</sup>

The writ of prohibition lies not only where there is an absolute want of jurisdiction over the subject matter of the controversy, but also where in the exercise of a rightful jurisdiction it exceeds its legitimate powers.<sup>2</sup>

§ 156. In the earliest case of prohibition<sup>3</sup> which was an action for a tort committed upon the high seas, a cause of action which gave rise to a maritime lien, the court by its writ of prohibition stopped the District Court which had assumed

<sup>1</sup> Moore's P. C. C. (N. S.) 471. Unless there is *mala fides*, *Thompson v. Lyle*, 3 W. & S. (Pa.) 166.

<sup>2</sup> High's Ex. Leg. Rem. 565, 779. See *contra*, *Queen v. Twiss*, L. R. 4 Q. B. 407; *Forster v. Forster*, 4 B. & S. (116 E. C. L. R.) 187.

<sup>3</sup> *Quimbo v. The People*, 20 N. Y. 531; *State v. Ridgell*, 2 Bailey (S. C.) 560; in this case the court below had convicted a person of an offence not capital, and sentenced him to death, the Supreme Court of South Carolina prevented the execution of the sentence by writ of prohibition.

<sup>4</sup> U. S. v. Peters, 3 Dall. 121.

jurisdiction by issuing process, from proceeding in the cause, because the vessel attached was a public armed vessel of a friendly power.

The cause was maritime, and as such created a lien, but the vessel attached was not the proper subject of the process of seizure. The same result could have been obtained by an appeal taken from a decree in the District Court, since one of the elements was wanting to authorize jurisdiction; but the parties were not compelled to appeal, and proceedings were enjoined by prohibition.

In *Ex parte Easton*<sup>1</sup> a motion for a petition for a writ of prohibition to prevent the enforcement of a lien for wharfage against a canal boat was allowed, but on the hearing the writ was refused, as wharfage was held to be a maritime contract, and the vessel arrested was a commercial vessel found within the jurisdiction of the court issuing process, and had become subject to a lien for wharfage.<sup>2</sup>

These cases illustrate the principle, that absence of jurisdiction to issue the process is as fatal on prohibition as absence of jurisdiction over the subject matter itself. The allowance of process *in rem* is an adjudication of the existence of the jurisdiction assumed, and the writ of prohibition is the

<sup>1</sup> 95 U. S., 68.

<sup>2</sup> See *The John M. Welch*, 18 Blatch. 54.

peculiar process provided by the legislature, which gives this supervisory power to the Supreme Court to prevent the abuse of process by the inferior courts of admiralty;<sup>1</sup> while the right of appeal to the Supreme Court is so restricted as to be practically forbidden to the mass of suitors.

§ 157. In the three latest cases, however, on the subject of prohibition, the Supreme Court refuses to allow the writ of prohibition to issue, to inquire as to the legality of the arrest of the vessel, where the subject of the suit is maritime, and holds that the only redress is by appeal.<sup>2</sup>

*Ex parte* Gordon was the case of a British vessel attached in a cause of action arising out of a death occasioned by a collision off the capes of Virginia. The relator sought to stop the exercise of the right to arrest by raising the question whether an action for death was cognizable in the admiralty.

Two questions arose whether:—

1st. Such an action lay independently of statute.

2d. And, if given by the law of the locality it created a lien, so as to give the admiralty process *in rem*. The existence of a maritime lien arising from death was directly involved and the jurisdiction to enforce it against this vessel.

<sup>1</sup> *Thompson v. Lyle*, 3 W. & S. (Pa.) 166.

<sup>2</sup> *Ex parte* Gordon, 104 U. S. 515; *Ex parte* Ferry Co., 104 U. S. 519; *Ex parte* Hagar, 104 U. S. 520.

In *Ex parte* Ferry Co., the same question arose in an action against a vessel for death from collision in the Detroit River.<sup>1</sup>

In both cases the prohibition was denied for the same reasons. The court says that "the suit is for damages growing out of collision. Having jurisdiction in respect to the collision it would seem necessarily to follow that the court had jurisdiction to hear and decide what liability the vessel had incurred thereby."

The court followed the ruling of the Queen's Bench in *The Charkieh*,<sup>2</sup> where on a suggestion that in a case of collision between the *Charkieh* and the *Batavier* the court of admiralty had no jurisdiction because the *Charkieh* was a ship of a branch of the Turkish navy. Chief Justice Cockburn held that this was a question within the province of the court of admiralty to decide. He also added: "If it entertains the suit there is an appeal to the judicial committee of the privy council."

In *Ex parte* Ferry Co.<sup>3</sup> the court added "a prohibition cannot be made to perform the office of a

<sup>1</sup> In neither of these cases was the right of the court to examine into the jurisdiction on a motion for a writ of prohibition questioned in the briefs filed on the motion for a writ. The course was suggested in the opinion of the District Court of Michigan overruling the exceptions to the jurisdiction.

<sup>2</sup> L. R. 8 Q. B. 197.

<sup>3</sup> 104 U. S. 519.

proceeding for the correction of mere errors and irregularities. If there is jurisdiction, and no provision for appeal or writ of error, the judgment of the trial court is the judgment of the court of last resort, and concludes the parties."<sup>1</sup>

*Ex parte Hagar*<sup>2</sup> was an application for a writ of prohibition to restrain the enforcement of a law of the state of Delaware, imposing compulsory pilotage on vessels entering the Delaware by the Hellenopen channel, by process of attachment of the vessel.

Two questions were involved:—

1st. Whether a vessel calling at the Delaware breakwater for orders, and not entering the harbor, which proceeds on to Philadelphia, became subject to the pilotage laws of the state of Delaware.

2d. Whether a maritime lien was created by a refusal of a vessel to accept a Delaware pilot, where the statute of Delaware did not create a lien.

The decision rendered was that as all claims for pilotage are within the jurisdiction of the admiralty, the District Court could properly hear and decide the matters in dispute.<sup>3</sup>

<sup>1</sup> In these decisions, the court did not notice their own decision in *The U. S. v. Peters*, 3 Dall. 121.

<sup>2</sup> 104 U. S. 520.

<sup>3</sup> See article Pilotage by H. G. Ward, 17 Am. L. Rev. 888-894.

In *Ex parte Pennsylvania*,<sup>1</sup> an application was made for a writ of prohibition to prevent the admiralty from enforcing compulsory pilotage laws under a statute of the state of Delaware against a vessel not bound to a port of that state, but to the port of Philadelphia, under the laws of which port the vessel was free from pilotage. The court, on a motion for a writ of prohibition, refused to examine whether the laws of Delaware governed the case, and held that as the cause was one within the admiralty jurisdiction, and the vessel was within the district when arrested, the court was competent to try the validity of the statute. It distinguished this case from that of *Ex parte The Devoe Manufg. Co.*,<sup>2</sup> where the question was as to the right of the court to execute its process in the place where the seizure was made.

In which case the Supreme Court examined the right of an admiralty court to arrest a vessel in a maritime cause, on an application for a writ of prohibition. The ground of the application was that the vessel was not within the jurisdiction of the court which issued process when arrested. The application was denied for the reason that the vessel was arrested within the jurisdiction of the court. This case somewhat modifies the ruling in

<sup>1</sup> 109 U. S. 174.

<sup>2</sup> 108 U. S. 401.

the former cases, as the court examined the jurisdiction of the court to proceed *in rem* in a maritime cause.

The writ will not therefore lie wherever, in a cause of admiralty jurisdiction, the vessel is arrested within the district, within the limits of the jurisdiction of the court in a maritime cause, and the remedy is confined to such cases where the court attempts to proceed in a cause not within the admiralty grant or against a vessel not subject to arrest,<sup>1</sup> and where no appeal lies, the suitor is without a remedy, if the court has jurisdiction of the cause of controversy,<sup>2</sup> even if it attempts to enforce it by process *in rem*, where no lien is given by the maritime law, because the right to process *in rem* is considered a question of procedure, not one involving the jurisdiction of the court to exercise such process.<sup>3</sup>

§ 158. The limit of the amount giving the right of appeal is governed by the same principles as those in writs of error. As respects the libellants, the right to appeal is governed by the

<sup>1</sup> The U. S. v. Peters, 3 Dall, 121; *Ex parte* Devoe Manufg. Co., 108 U. S. 401.

<sup>2</sup> *Ex parte* Ferry Co., 104 U. S. 519; *Ex parte* Pennsylvania, 109 U. S. 174.

<sup>3</sup> The St. Lawrence, 1 Black, 522; *Ex parte* Hagar, 104 U. S. 520.



amount stated in the libel, and interest is not computed unless specially claimed, as it is merged in the claim stated in the libel.<sup>1</sup> Nor can the libel be amended after an appeal so as to include interest for the purpose of giving the court jurisdiction.<sup>2</sup>

Where the libellant acquiesces in the decree, although the amount claimed in the libel gave jurisdiction on appeal, the respondent cannot appeal unless the decree rendered against him is in the necessary amount,<sup>3</sup> and the plaintiff can before judgment remit so much of his claim as exceeds the amount necessary to give appellate jurisdiction and destroy the defendant's right to a writ of error or appeal.<sup>4</sup>

Where the judgment is for an amount sufficient to give jurisdiction on appeal, yet if it appears by a case stated or otherwise that the sum actually in dispute did not involve the necessary amount, the appeal or writ of error will be dismissed.<sup>5</sup>

<sup>1</sup> *Udall v. The Ohio*, 17 How. 17; *Olney v. The Falcon*, 17 How. 19.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Merrill v. Petty*, 16 Wall. 338; *Gordon v. Ogden*, 3 Pet. 33; *Wise v. The Turnpike Co.*, 7 Cranch, 276; *Greigg v. Reade, Crabbe*, 64.

<sup>4</sup> *Thompson v. Butler*, 95 U. S. 694.

<sup>5</sup> *Tintsman v. The National Bank*, 100 U. S. 6; *Gray v. Blanchard*, 97 U. S. 564.

Where two separate libels were filed in different districts growing out of a collision between two vessels, the fact that the amount of damage involved in the two separate suits growing out of the same collision was sufficient to give jurisdiction on appeal, will not authorize an appeal on behalf of the owners of one of the vessels whose libel was dismissed where the amount involved in their libel did not give jurisdiction; although the decree rendered in the libel in which he was respondent was sufficient.<sup>1</sup>

§ 159. Where two sets of salvors united in a libel for a salvage service to a single vessel, and the decree against the claimants of the property saved was in an amount sufficient to authorize an appeal, and the court apportioned the amount awarded among different salvors, the owner against whom a decree was rendered was entitled to appeal from the whole award, although in the apportionment among the salvors some got less than the

<sup>1</sup> *Merrill v. Petty*, 16 Wall. 338. The two causes were not consolidated, and were brought in different districts. The Supreme Court at the same term reversed the decree against the vessel of the owner whose appeal had been dismissed for want of jurisdiction, holding the collision to be the fault of the other vessel. What would have been the result if there had been cross-libels is not decided; *The Mary Eveline*, 16 Wall. 348.

amount necessary to give jurisdiction on appeal.<sup>1</sup> On the other hand, where a libel for salvage was filed against cargo owned by several parties, and the whole sum awarded exceeded two thousand dollars, but was made payable by separate claimants of the goods saved in the proportion of the value of the goods claimed, the proportion in no instance amounting to the sum necessary to give jurisdiction; each claim of cargo having a separate interest was treated as a separate appellant; and as the sum awarded for salvage was not entire for the purpose of founding a right against all the claimants jointly, so as to make the property of one claimant responsible for more than its own share of salvage, the appeal by the libellant was dismissed for want of jurisdiction.<sup>2</sup>

It is the amount decreed for salvage and not the value of the property saved, which determines the jurisdiction on appeal,<sup>3</sup> while in proceedings of forfeiture for breach of the revenue laws, the value of the property condemned is the standard and not the amount produced by sale after an appeal

<sup>1</sup> *The Connemara*, 103 U. S. 754. It is but one salvage service to be paid for by one sum of money.—Curtis, J., in *Williamson v. The Alphonso*, 1 Curtis, at p. 380.

<sup>2</sup> *Stratton v. Jarvis*, 8 Peters, 4; *Spear v. Place*, 11 How. 522.

<sup>3</sup> *Spear v. Place*, *ante*.

taken.<sup>1</sup> The same rule applies in case of an information of seizure or libel for capture as prize, where various claims are interposed by persons claiming under distinct and independent titles.<sup>2</sup>

§ 160. Where separate libels were filed against a vessel by owners of goods damaged, which were consolidated by an order of court, and damages were decreed in favor of libellants, in some cases amounting to more and in others to less than the amount required to give jurisdiction, the appeals were dismissed in those cases in which the damages did not reach the required amount.<sup>3</sup>

Where the Circuit Court in entering a decree for damages to the cargo gives the claimant leave to set off freight, and he elects to do so, and the amount of the decree so rendered becomes less than the amount required to give jurisdiction on appeal, the appeal will be dismissed, although the right to appeal was reserved.<sup>4</sup>

§ 161. Although a joint libel may be filed by separate interests growing out of the same cause of action, whether for services or for a tort; the

<sup>1</sup> *U. S. v. Eighty-four Boxes of Sugar*, 7 Peters, 453.

<sup>2</sup> *Per Story, J.*, in *Oliver v. Alexander*, 6 Peters, 143.

<sup>3</sup> *Rich v. Lambert*, 12 How. 347; *The Rio Grande*, 19 Wall. 178.

<sup>4</sup> *Sampson v. Welch*, 24 How. 207.

contract is always treated in admiralty according to the truth, and each claim is considered as distinct, so that an appeal from a decree for seamen's wages in separate amounts, in a joint libel, will be dismissed where the sum awarded to each seaman was less than the required amount,<sup>1</sup> and in a joint libel on behalf of the owners of a ship and of the owners of the cargo setting forth separate claims for a collision with another vessel, the respondents' appeal from a decree was dismissed for want of jurisdiction where the amounts awarded to the owners of the ship and of the cargo were each less than the required amount, although the whole decree exceeded five thousand dollars.<sup>2</sup>

But in case of a simple mortgage given in an amount sufficient to cover the claims of several creditors, the court will look to the amount of the mortgage, and not to the separate claims of each creditor secured by it, to determine its jurisdiction on appeal.<sup>3</sup>

§ 162. As the recovery in proceedings *in rem* cannot exceed the amount of the stipulation for value, an appeal will be dismissed from a decree dismissing the libel, where the libellant's claim

<sup>1</sup> *Oliver v. Alexander*, 6 Pet. 143.

<sup>2</sup> *Ex parte Baltimore & Ohio R. R. Co.*, 106 U. S. 5.

<sup>3</sup> *Rodd v. Heartt*, 17 Wall. 354.

exceeded the five thousand dollars, but the amount of the stipulation was less than that amount.<sup>1</sup> In proceedings to limit the liability of ship-owners, where it appears that the amount of all suits brought against the owners exceeded the amount of five thousand dollars, the jurisdiction on appeal was sustained, although the value of the property surrendered was less than that amount.<sup>2</sup>

In one case where the record did not state the amount involved in the claim of one joint libellant where the libel was dismissed, the appellant was allowed to establish by affidavits that the amount of his claim gave jurisdiction on appeal.<sup>3</sup>

<sup>1</sup> *The Jessie Williamson, Jr.*, 108 U. S. 305.

<sup>2</sup> *The Mamie*, 105 U. S. 773.

<sup>3</sup> *The Grace Girdler*, 6 Wall. 441.



## APPENDIX.

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### ADMIRALTY RULES OF THE SUPREME COURT OF THE UNITED STATES.

#### I.

No *mesne* process shall issue from the district courts in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall be filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court.

#### II.

In suits *in personam*, the *mesne* process may be by a simple warrant of arrest of the person of the defendant, in the nature of a *capias*, or by a warrant of arrest of the person of the defendant, with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for; or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or by a simple monition, in the nature of a summons to



appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.

[See pp. 324-9.]

### III.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, the marshal may take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory, or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation, summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

[See p. 325.]

### IV.

In all suits *in personam*, where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant whose property is so attached giving a bond or

stipulation, with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

V.

Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.

VI.

In all suits *in personam*, where bail is taken, the court may, upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be

required by the order of the court, to be given, upon motion, and due proof thereof.

VII.

In suits *in personam*, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court, upon affidavit or other proper proof showing the propriety thereof.

VIII.

In all suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if, upon the hearing, the same is required by law and justice.

IX.

In all cases of seizure, and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and

take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

[See pp. 355-7.]

X.

In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury; and the proceeds, or so much thereof as shall be a full security to satisfy in decree, to be brought into court to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him, upon a due appraisement, to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, in such sum as the court shall direct, to abide by and pay the

money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

[See *The G. G. King*, 16 Fed. 921.]

#### XI.

In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement, to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court or otherwise disposed of, as it may deem most for the benefit of all concerned.

[See pp. 339-43; 346-50; *The Mary N. Hogan*, 17 Fed. Rep. 813.]

#### XII.

In all suits by material-men for supplies or repairs, or other necessities, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*.

[See pp. 152-5; *The Lottawana*, 21 Wall. 558; *The St. Lawrence*, 1 Black, 522.]

XIII.

In all suits for mariners' wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or the master alone *in personam*.

[See pp. 52 and 331.]

XIV.

In all suits for pilotage the libellant may proceed against the ship and master, or against the ship, or against the owner alone or the master alone *in personam*.

[See pp. 51 and 331.]

XV.

In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*.

[See pp. 330-1; Rule 59, *post*, p. 450.]

XVI.

In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only.

## XVII.

In all suits against the ship or freight, founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs or other necessaries for the voyage, without any claim of marine interest, the libellant may proceed either *in rem*, or against the master or the owner alone *in personam*.

## XVIII.

In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrong-doer.

[See *The Virgin*, 8 Peters, 538.]

## XIX.

In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request

and for whose benefit the salvage service has been performed.

[See pp. 323-4 ; The Sabine, 101 U. S. 384.]

XX.

In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship, or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

[See pp. 38, 559.]

XXI.

In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a *feri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulators.

[See pp. 342, 4, and 5.]



## XXII.

All informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed.

[See pp. 78-83.]

## XXIII.

All libels in instance causes, civil, or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be; and, if the libel be *in rem*, that the property is within the

district; and, if *in personam*, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights, *in rem* or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

[See pp. 357-9.]

XXIV.

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special excep-

tions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

[See pp. 331-3 ; 382-3.]

XXV.

In all cases of libels *in personam*, the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken, and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties, in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the progress of the suit.

XXVI.

In suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and *bona fide* owner, and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, upon

putting in such claim, the claimant shall file a stipulation, with sureties, in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or, upon an appeal, by the appellate court.

[See pp. 341-3. *The Lady Pike*, 96 U. S. 461. *U. S. v. Ames*, 99 U. S. 35.]

XXVII.

In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel.

[See p. 317, *Andrews v. Wall*, 3 How. 572; *The L. B. Goldsmith*, 1 Newb. 123; *The H. D. Bacon*, 1 Newb. 274; *post*, 49th rule, page 441.]

XXVIII.

The libellant may except to the sufficiency, or fulness, or distinctiveness, or relevancy of the answer to the articles and interrogatories in the libel; and, if the court shall adjudge the same ex-

ceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

## XXIX.

If the defendant shall omit or refuse to make due answer to the libel upon the return-day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon the application of the defendant, admit him to make answer to the libel, at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

[See *Miller v. U. S.*, 11 Wall. 268; *The David Pratt*, 1 Ware, 495.]

## XXX.

In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and

exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso* against the defendant, to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

XXXI.

The defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for crime, or for any penalty or any forfeiture of his property for any penal offence.

XXXII.

The defendant shall have a right to require the personal answer of the libellant upon oath or solemn affirmation to any interrogatories which he may, at the close of his answer, propound to the libellant touching any matters charged in the libel, or touching any matter of defence set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution or punishment, or forfeiture, as is provided in the thirty-first rule. In default of due answer by the libellant to such interrogatories, the court may

adjudge the libellant to be in default, and dismiss the libel, or may compel his answer in the premises, by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice.

## XXXIII.

Where either the libellant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

## XXXIV.

If any third person shall intervene in any cause of admiralty and maritime jurisdiction *in rem* for his own interest, and he is entitled, according to the cause of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to

law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation, with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

[See pp. 334-5; *The Two Marys*, 12 Fed. Rep. 152.]

XXXV.

The stipulations required by the last preceding rule, or on appeal, or in any other admiralty or maritime proceeding, shall be given and taken in the manner prescribed by rule fifth as amended.

XXXVI.

Exceptions may be taken to any libel, allegation, or answer for surplusage, irrelevancy, impertinence, or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged, at the cost and expense of the party in whose libel or answer the same is found.

XXXVII.

In cases of foreign attachment, the garnishee shall be required to answer an oath or solemn affir-



mation as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admits any debts, credits, or effects, the same shall be held in his hands, liable to answer the exigency of the suit.

## XXXVIII.

In cases of mariners' wages, or bottomry, or salvage, or other proceedings *in rem*, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and, upon failure of the party to comply with the order, may award an attachment, or other compulsive process, to compel obedience thereto.

## XXXIX.

If, in any admiralty suit, the libellant shall not appear and prosecute his suit, according to the

course and orders of the court, he shall be deemed in default and contumacy; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

XL.

The court may, in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

XLI.

All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

## XLII.

All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out, except by a check or checks, signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all the checks so drawn and the date thereof.

## XLIII.

Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceeding, to intervene *pro interesse suo* for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

[See pp. 334-5.]

XLIV.

In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in reference to them, including the power to administer oaths to and to examine the parties and witnesses touching the premises.

XLV.

All appeals from the District to the Circuit Court must be made while the court is sitting, or within such other period as shall be designated by the District Court by its general rules, or by an order specially made in the particular suit; or in case no such rule or order be made, then within thirty days from the rendering of the decree.

[See pp. 378-80; 381-2; *The S. S. Osborne*, 105 U. S. 447; *Drake v. The Bristol*, 9 Chic. L. N. 321; *U. S. v. Glamorgan*, 2 Curtis, 236.]

XLVI.

In all cases not provided for by the foregoing rules, the District and Circuit Courts are to regulate

the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

XLVII.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the state where an arrest is made upon similar or analogous process issuing from the state courts.

And imprisonment for debt, on process issuing out of the admiralty court, is abolished in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been, or shall be hereafter, abolished, upon similar or analogous process issuing from a state court.

XLVIII.

The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the District Court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court.

All rules and parts of rules heretofore adopted, inconsistent with this order, are hereby repealed and annulled.

[See pp. 324-5.]

XLIX.

Further proof, taken in a Circuit Court upon an admiralty appeal, shall be by deposition, taken before some commissioner appointed by a Circuit Court, pursuant to the acts of Congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the act of Congress of the 24th of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such depositions upon written interrogatories and cross-interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified not less than twenty-four hours, and, in addition thereto, one day, Sundays exclusive, for every twenty miles' travel; provided, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

## L.

When oral evidence shall be taken down by the clerk of the District Court, pursuant to the above-mentioned section of the act of Congress, and shall be transmitted to the Circuit Court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect.

## LI.

When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be allowed. But within such time after the answer is filed as shall be fixed by the District Court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.

## LII.

The clerks of the District Court shall make up the records to be transmitted to the Circuit Courts on appeals, so that the same shall contain the following:—

1. The style of the court.

2. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

3. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof; all bail and stipulations; and, if any sale has been made, the orders, warrants, and reports relating thereto.

4. The libel, with exhibits annexed thereto.

5. The pleadings of the defendant, with the exhibits annexed thereto.

6. The testimony on the part of the libellant, and any exhibits not annexed to the libel.

7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

8. Any order of the court to which exception was made.

9. Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the assessor, are to be stated.

10. The final decree.

11. The prayer for an appeal, and the action of the District Court thereon; and no reasons of appeal shall be filed or inserted in the transcript.



The following shall be omitted :—

1. The continuances.

2. All motions, rules, and orders not excepted to which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the District Court was founded on some one or more of these ; in which case, so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to ; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

2. The clerk of the District Court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the District Court in the cause named at the beginning of the copy made up pursuant to this rule ; and no other certificate of the record shall be needful or inserted.

3. Hereafter, in making up the record to be

transmitted to the Circuit Court on appeal, the clerk of the District Court shall omit therefrom any of the pleading, testimony, or exhibits which the parties by their proctors shall by written stipulation agree may be omitted; and such stipulation shall be certified up with the record.

[See S. C. Rule 8, par. 6, as to record on appeal.]

LIII.

Whenever a cross-libel is filed upon any counter-claim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

[See pp. 231, 387; *Empresa Maritima à Vapor v. N. & S. Am. St. Nav. Co.*, 16 Fed. Rep. 502; *The Dove*, 91 U. S. 381; *The Ping-On*, 11 Fed. Rep. 607.]

*Supplementary rules of practice in admiralty under the act of March 3, 1851, entitled "An act to limit the liability of ship-owners, and for other purposes."*

## LIV.

When any ship or vessel shall be libelled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the said act above recited, the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners,

respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice reserved through the post-office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

[See pp. 285-92; *Norwich Co. v. Wright*, 13

Wall. 104; Prov. & N. Y. S. S. Co. v. Hill M'fg. Co., 109 U. S. 578.]

## LV.

Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner, to be designated by the court, subject to the right of any person interested to question or controvert the same; and, upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense), shall be divided *pro rata* amongst the several claimants, in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

## LVI.

In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that, in his or

their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both.

[See pp. 287-9.]

LVII.

The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be libelled to answer for any such embezzlement, loss, destruction, damage, or injury; or, if the said ship or vessel be not libelled, then in the District Court for any district in which the said owner or owners may be sued in that behalf. If the ship have already been libelled and sold, the proceeds shall represent the same for the purposes of these rules.

[See pp. 297-8; *Norwich Co. v. Wright*, 13 Wall. 104.]

## LVIII.

All the preceding rules and regulations for proceeding in cases where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the Circuit Courts of the United States where such cases are or shall be pending in said courts upon appeal from the District Courts.

## LIX.

In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against *in personam*, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall

answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, to pay to the libellant and to any claimant or new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court upon the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in like cases from parties brought in under process issued on the prayer of a libellant.

[See pp. 225-7.]





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